United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,204

DAVID LUXENBERG,
Appellant,

v.

MAYFAIR EXTENSION, INC.,
a corporation,
GOSPEL SPREADING ASSOCIATION, INC.,
a corporation,
L. S. MICHAUX,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

WALTER N. TOBRINER
JOHN B. DUNCAN
CHARLES M. DUKE
Board of Commissioners
for the District of Columbia
District Building
14th and E Streets, N. W.
Washington, D. C. 20004
Plaintiffs,

vs.

MAYFAIR EXTENSION INCORPORATED
3819 Jay Street, N. E.
Washington, D. C. 20019
Defendant,

DAVID LUXENBERG
3926 Hayes Street, N. E.
Washington, D. C. 20019
Third-Party Defendant.

Civil Action No.
3119-'64

DOCKET ENTRIES

1964

Dec. 18	Complaint, appearance, filed.
Dec. 18	Summons copies (1) and copies (1) of Complaint issued Ser 12/21/64.
Dec. 29	Third party complaint vs. David Luxenberg; exhibit A; appearance of Peed & Wise, filed.
Dec. 29	Third party summons, copy and copy of complaint and third party complaint. Ser 12/30/64.
Dec. 29	Answer of deft to complaint; c/s 12/29/64, filed.

1965

Jan. 18	Appearance of Warren E. Magee as atty for David Luxemberg, filed.

Jan. 18	Stipulation extending time for third party deft to answer to 2/8/65, filed.
Feb. 8	Answer of third party deft to complaint and third party complaint; cross-claim vs deft; jury demand; c/m 2/8/65; appearance of Trammell, Rand & Nathan, filed.
Feb. 17	Answer of deft to cross-claim; c/m 2/17/65, filed.
Feb. 17	Calendared (AC/N) (N).
May 21	Certificate of Readiness by 3rd party deft; c/m 5/19/65, filed.
June 2	Motion of 3rd party deft to advance, P&A's, affidavit: c/m 5/19/65, M.C. 6/2/65, filed.
June 18	Order granting motion of David Luxemberg, 3rd party defendant and cross plaintiff, for speedy hearing under Rule 57 FRCP: directing Clerk to Place on calendar for speedy hearing for pre-trial and for trial on merits. (N) (AC/N), Youngdahl, J.
June 18	Calendared (AC/N) (N).
July 12	Pretrial Proceedings. Pretrial Examiner.
Aug. 9	List of witnesses by deft #1; c/m 8/9/65, filed.
Aug. 11	List of witnesses by 3rd party deft Luxenberg; c/m 8/9/65, filed.
Sept. 2	List of witnesses by pltf; c/m 9/2/65, filed.
Sept. 13	Appearance of Warren E. Magee as atty for David Luxemberg, filed.
Sept. 13	Jury demand withdrawn per all counsel. (AC/N), filed.
Sept. 13	Hearing begun; finding in part for pltff vs deft; hearing on third party complaint respited until Sept. 14, 1965. (Findings of Fact, Conclusions of Law and Order to be presented) (Rep. Dorothy Sweet), Walsh. J.
Sept. 14	Hearing resumed on third party complaint; concluded and taken under advisement; (Briefs to be submitted within two weeks). (Rep: Dorothy Sweet), Walsh, J.

Sept. 14	Oral motion of third party deft to add Gospel Spreading Association, Inc., and L. S. Michaux as parties deft granted. (Order to be presented) (Rep: Dorothy Sweet), Walsh, J.
Oct. 15	Findings of Fact and conclusions of law (N), Walsh, J.
Oct. 15	Order adding Gospel Spreading Association, Inc., a corporation and Elder L. S. Michaux, individually, as parties defendants and cross-defendants; all orders and judgments entered and to be entered, declared to be binding upon Gospel Spreading Association, Inc., and Elder L. S. Michaux. (N), Walsh, J.
Oct. 27	Order granting plaintiff's request for injunctive relief and directing certain structure be razed and lots cleared on or before 2/1/66 and directing David Luxenburg to vacate certain premises on or before 11/25/65. (N), Walsh, J.
Oct. 29	Transcript of proceedings 9-13 and 9-14-65, Volume I & II, pages 1 thru 123, (Rep: Dorothy F. Sweet) (Court's Copy), filed.
Dec. 8	Supplemental brief of David Luxenberg 3rd party deft; c/m 12/8/65, filed.

1966

Jan. 11	Memorandum brief of deft and cross deft on liability and damages: c/m 1/7/66, filed.
Jan. 28	Brief of David Luxenberg, Third Party deft and Cross-plaintiff with proposed findings of fact and conclusions of law. c/m 9/29/65, filed.
Jan. 20	Brief of Mayfair Extension, Inc., Cross-defendant with P&A: c/m 9/28/65, filed.
Jan. 20	Memorandum of Opinion finding in favor of the Cross-defendant in Luxenberg Cross-complaint vs Cross-defendant Mayfair. (N) (Order to be submitted), Walsh, J.

Jan. 28	Order dismissing complaint of cross-pltf David Luxenberg. Walsh. J.
Feb. 24	Notice of appeal of 3rd Party Deft, Luxenberg, deposit by Magee $5.00: (copies mailed to James Cashman and Joel C. Wise) filed.
Mar. 25	Motion of 3rd party deft to extend time to docket appeal and to file record on appeal: c/m 3/24/66, filed.
Mar. 25	Order extending time for 50 days from April 6, 1966, or to and including May 26, 1966, to docket and file record on appeal. (N), Walsh, J.
Mar. 25	Luxenberg Exhibits mailed to counsel.
May 18	Transcript of proceedings 9/13/65 and 9/14/65; pp. 1 - 123 (incl) (Rep: Dorothy F. Sweet), Attorney's copy, filed.
May 18	Exhibits Nos. 1, 2, 3, 4 of deft, filed.
May 25	Record on Appeal delivered to USCA, Deposit by Warren E. Magee $1.70.
May 25	Receipt from USCA for Original papers, filed.
June 30	Transcript of proceedings: 9/13/65; pp. 1-11(incl.) (Rep: Dorothy F. Sweet) (Court's copy), filed.
July 13	Stipulation supplementing record on appeal, Walsh, J.
July 13	Transcript of proceedings, 9/13/65; pp. 1 - 11 (incl) (Reported by Dorothy L. Sweet) (Atty's copy), filed.
July 15	Supplemental Record delivered to USCA. Deposit by Warren E. Magee 50¢.
July 15	Receipt from USCA for Supplemental Record, filed.

[Filed Dec. 29, 1964]

THIRD PARTY COMPLAINT FOR INJUNCTION

1. All the allegations set forth in Plaintiff's Complaint for Injunction are incorporated herein by reference and made a part hereof, a copy of which is attached and marked Exhibit "A".

2. Third-Party Defendant is a tenant occupying the said premises under a Lease Agreement, a copy of said lease and agreement are attached and marked Exhibit "B".

3. The Lease Agreement provides that if Third-Party Defendant should violate any regulation of the District of Columbia then, in that event, the lease shall cease and determine.

4. Third-Party Defendant well knew upon execution of said lease that said premises were of a temporary nature and subject to demolition.

Wherefore, Defendant prays:

1. That the Third-Party Defendant be made a party to any permanent injunction decreed by this Court:

2. That, in the event this Court should order the buildings to be demolished, Third-Party Defendant be ordered to vacate said premises in order to permit said building to be demolished:

3. And for such further relief as the Court shall deem proper under the premises.

Respectfully submitted,

/s/ Joel C. Wise

[Filed Feb. 8, 1965]

ANSWER OF THIRD PARTY DEFENDANT AND CROSS PLAINTIFF, DAVID LUXENBERG, TO COMPLAINT AND THIRD PARTY COMPLAINT
(Presenting Defenses and Asserting a Cross Claim Against Mayfair Extension Incorporated by Way of Declaratory Judgment and for Damages for Breaches of Lease)

The third party defendant and cross plaintiff, David Luxenberg, answers the Complaint and Third Party Complaint filed herein as follows:

First Defense

The Complaint and Third Party Complaint fail to state a cause of action against this third party defendant and cross plaintiff upon which the relief prayed for therein can be granted.

Second Defense

1. Third party defendant and cross plaintiff admits the allegations of paragraphs 1, 2 and 3 of the Complaint and paragraph 2 of the Third Party Complaint.

2. Third party defendant and cross plaintiff is without sufficient knowledge, information and belief to admit or deny the allegations of paragraphs 4 through 15 of the Complaint, and, therefore, denies the same, and if these allegations become material in the trial of this action, demands strict proof thereof.

3. Third party defendant and cross plaintiff denies the allegations of paragraphs 1, 3 and 4 of the Third Party Complaint, except as heretofore admitted in this Answer.

Third Defense

In legal proceedings entitled Information Case No. DC 14842-63, the District of Columbia filed an Information in the General Sessions

Court of the District of Columbia against the defendant, Mayfair Extension Incorporated, a corporation, acting by and through its President, Elder S. Michaux, charging the following facts:

> "That on or about March 2, 1963, and including the date of the filing of this information, the premises 3900 through 3926 Hayes Street, N. E. and premises 771 Kenilworth Avenue, N. E., D.C., did then and there fail to comply with the provisions of a building permit issued on August 5, 1946 by the Department of Licenses and Inspections and a renewal thereof issued on July 7, 1947, to-wit, did fail to remove buildings on said premises within two years after the National Emergency which terminated by Presidential proclamation on April 28, 1956, contrary to Section 3-132-D.C. Building Code, a law of the District of Columbia."

This action was filed on May 27, 1963 and after a plea had been filed denying the allegations of the Information by the defendant, Mayfair Extension Incorporated, the case came on for a hearing on the merits before the General Sessions Court of the District of Columbia. At the conclusion of the evidence submitted, the General Sessions Court found against the District of Columbia, thus rendering the issues alleged on behalf of the District of Columbia in the Complaint for Injunction filed in the above-entitled civil action 3119-64 as adjudicated and res adjudicata, and precludes the plaintiff from re-litigating these facts, which are identical with the facts set forth in the Complaint for Injunction filed in said civil action.

CROSS CLAIM

The third party defendant and cross plaintiff files this, its Cross Claim, against the defendant, Mayfair Extension Incorporated.

1. The Cross-Claim is of a civil nature and the amount in controversy exceeds the sum of $10,000.00, besides interest and costs.

2. The third party defendant and cross plaintiff is a citizen of the

United States and a resident of the District of Columbia, and brings this Cross Claim in his own right and as the lessee of the defendant and cross defendant. Mayfair Extension Incorporated, a Maryland corporation.

3. Mayfair Extension, Incorporated is a Maryland corporation and is doing business in the District of Columbia, in that it owns and operates a shopping center with various businesses located therein on a parcel of land more particularly bounded and described as follows:

> (a) Parcel 177/82, in Northeast Washington, D.C. bounded on the East by 600.55' running North and South along Kenilworth Avenue: bounded on the West by 600.56' running North and South along Kenilworth Terrace: bounded on the South by 212.-14' running East and West on Hayes Street; and bounded by 211.93' running East and West along Jay Street - this parcel containing 126,257.1574 square feet of ground - that is 2.898 acres of ground.

4. On November 9, 1951 David Luxenberg and one Barney Moder leased from the defendant corporation a completely equipped supermarket located in premises 3926 Hayes Street, N. E., being a part of a business structure situated and located on the above-described property, for a term of five (5) years, with the option to renew the term for an additional five (5) years, at a monthly minimum rental of One Hundred Seventy Five Dollars ($175.00), and an additional rental on all of the gross volume over and above Three Thousand Dollars ($3,000,00) per week, computed at the rate of One and one-half percent (1-1/2%) of said excess over said $3,000.00 in gross business per week. David Luxenberg paid to the defendant for the good will in the grocery business theretofore conducted in said premises by the defendant the sum of Fifteen Thousand Dollars ($15,000.00).

5. Said lease dated November 9, 1951 provided that the third party defendant and cross plaintiff David Luxenberg, and the said Barney

Moder shall have the exclusive right to conduct a food store in the premises for the duration of the lease. The lease further provided that in the event the building in which the grocery store was to be located was demolished for reconstruction or replacement purposes, David Luxenberg and said Barney Moder shall have the first option to lease the food market and grocery store in said replacement facilities for a term at least equal to the unexpired term of this lease.

6. On December 5, 1955 said Barney Moder assigned, for the sum of Five Thousand Dollars ($5,000.00), all of his right title and interest in and to said lease dated November 9, 1951 and in the renewal option therein, to David Luxenberg.

7. On the 9th day of August, 1961 the defendant corporation and the cross plaintiff, David Luxenberg, entered into a Lease Agreement. Said Agreement referred to said lease of November 9, 1951 and to the fact that Barney Moder had assigned all of his right, title and interest in and to said Lease of November 9, 1951 to the plaintiff, and further stated that it was the desire of the parties to confirm their agreement and understanding with respect thereto and to make certain amendments thereto, and on said date the cross plaintiff and defendant corporation did agree as follows:

> "NOW, THEREFORE, IT IS AGREED AS FOLLOWS:
>
> (1) The aforesaid lease of November 9, 1951 shall remain in full force and effect under all of its terms and conditions, except as herein otherwise provided, in favor of the herein-named lessee.
>
> (2) The term of the aforesaid lease is hereby extended for a period of five years from November 15, 1961, with an option in favor of the lessee for one renewal of said lease for a period of five (5) years from November 15, 1966, under the same terms and conditions of said lease, as amended hereby provided that the lessee shall notify the lessor on or before September 15, 1966, in writing, of election to exercise this option.

(3) Legal title to all of the fixtures and equipment set forth in the aforesaid lease of November 9, 1951 is hereby vested in the lessee outright, free and clear of all encumbrances of every nature whatsoever as his sole and absolute property, for and in consideration of the payment to the lessor of the sum of One Thousand ($1,000.00) Dollars in cash, the receipt of which is hereby acknowledged by the lessor.

(4) Notwithstanding the provisions of the aforesaid lease to the contrary, it is expressly agreed and understood that the lessee shall have the right to assign the said lease, in whole or in part, only with the consent of the lessor in the event of a sale or transfer of the business located in the leased premises.

(5) It is hereby acknowledged that the lessee has currently met all of the terms, conditions and obligations of the aforesaid lease, including the amendments thereto resulting from the execution of this agreement, accrued up to the day and date of the execution hereof.

(6) The terms and conditions of the aforesaid lease granting to the lessees therein named the first option to lease the said food and grocery facilities which might replace the existing premises after the possible demolition thereof shall remain in full force and effect in favor of the lessee except only that the rate of rental to be paid in such case shall be in an amount equal to a bona fide offer which the lessor may receive from another prospective tenant under like conditions as those in favor of the lessee, and in such case the lessee shall have thirty days from the date of the receipt by him of notice of the terms and conditions of said bona fide offer within which to elect to exercise said option to lease the said replaced facilities."

8. The cross plaintiff has met all of his obligations under the aforesaid lease as amended and has paid to the defendant and its assignees

all of the rents provided for therein and, in addition, paid the defendant under said Agreement dated August 9, 1961 the sum of One Thousand Dollars ($1,000.00) for certain fixtures in the leased premises.

9. On April 19, 1963, cross plaintiff, under the provision designated (2) of said Lease Agreement dated August 9, 1961, renewed the lease term for an additional period of five (5) years from November 15, 1966.

10. Defendant corporation has entered into an arrangement scheme and plan through its agents, Walker & Dunlop, Inc., of 905 16th Street, N.W., Washington, D.C., and certain other persons, including the chain grocery store known as Grand Union, to wrongfully deprive the cross plaintiff of his lease as amended and to oust him from the leased premises and to lease said premises, that is, the portion of planned premises to be constructed on the aforesaid land of the defendant for grocery store purposes, when built. Pursuant to this plan and scheme, including the financial arrangements therefor, defendant did notify the cross plaintiff to vacate said premises on the untrue contention that there is a binding condemnation of the District of Columbia Government requiring the present structures on the aforesaid lands and premises to be demolished, when in truth and fact there is no such valid condemnation order in existence at this time. Pursuant to this plan and scheme, the defendant, through its agents, has entered into a binding Lease arrangement with said Grand Union chain, giving it the exclusive right to lease all facilities in the newly constructed building on said premises, when completed, for Grand Union's exclusive use as a grocery store, thus breaching the terms of the lease as amended existing between the cross plaintiff and the defendant corporation in this regard.

11. Pursuant to the aforesaid plan and scheme of the defendant corporation, its agents, Walker & Dunlop, Inc., and Grand Union, a letter dated August 5, 1964 was sent by Walker & Dunlop, Inc., as the agents for the defendant, to the cross plaintiff, advising that it was the inten-

tion of the defendant to demolish the existing structures on said real estate and requested the cross plaintiff to "vacate the premises on or before October 1, 1964."

12. Cross plaintiff alleges that the defendant had no right to order the cross plaintiff to vacate said premises and that the defendant's actions constitute a breach of the cross plaintiff's lease with the defendant as amended. particularly as the defendant has entered into a binding arrangement to lease the premises and the space therein to be utilized as a grocery store. not to the cross plaintiff, as provided for in his lease as amended. but to a competitor of the cross plaintiff, namely, Grand Union. and has given the latter the exclusive right to operate a grocery store in said newly constructed structures on the premises now leased to the cross plaintiff. Defendant later withdrew the notice to vacate.

13. Said actions of the defendant, its agents and Grand Union, cross plaintiff alleged. and the renting of space for grocery purposes to others, constitute the first breach of the lease as amended existing between the defendant and the cross plaintiff, and said breach, particularly if the defendant demolishes the aforesaid building, has caused and will cause damages to the cross plaintiff.

14. Cross plaintiff alleges that the defendant contends that it has a right to demolish the premises and to lease it to someone else in disregard of the cross plaintiff's rights under the aforesaid lease as amended, and has the right to require the plaintiff to vacate said premises. Thus, a controversy exists between the plaintiff and the defendant which should be adjudicated and determined at the earliest possible date in order to prevent irreparable injury to the cross plaintiff, who has no other grocery facility in which to move his existing grocery facilities at 3926 Hayes Street, N.E., said leased premises.

15. Cross plaintiff has performed all of the obligations agreed to by the cross plaintiff in the lease of November 9, 1951, and the lease agreement of August 9, 1961, and particularly has paid to the defendant

and its assignees all of the rents and other payments provided for therein to the defendant and/or its assignees up to date.

16. Cross plaintiff is informed and believes that he is entitled to have this Court adjudge and declare the rights of the parties in the premises and determine whether or not he is required to vacate the leased premises and is entitled to have the aforesaid lease as amended declared to be a valid and subsisting lease on the aforesaid real estate and that the defendant has no right to demolish the aforesaid leased structure, unless the defendant agrees and permits cross plaintiff to continue to lease like space, that is, the same amount of space, in the new structure if erected by the defendant, at the rate of rent determined under the procedures set forth in the amendment to said lease, said amendment being dated August 9, 1961.

17. Cross plaintiff alleges he has suffered and will suffer damages which will include the loss of the sum of Twenty Thousand Dollars ($20,000.00) paid by him for the goodwill existing in the grocery operation conducted on said premises: the One Thousand Dollars ($1,000.-00) paid for fixtures located in said premises and income to him derived from operating a grocery business in said premises of approximately Twenty Thousand Dollars ($20,000.00) per year, which loss of $20,-000.00 per year, as under the terms of the existing lease as amended and as extended, will cover an additional period of seven years, will total for said seven year period the sum of One Hundred Forty Thousand Dollars ($140,000.00), or a total sum in damages of One Hundred Sixty One Thousand Dollars ($161,000.00), together with interest thereon.

WHEREFORE, the premises considered, cross plaintiff prays:

1. That the Complaint and the Third Party Complaint be dismissed and that the third party defendant have and recover of the plaintiff and defendant his costs and a reasonable attorney's fee.

2. That this Court adjudge and declare that said lease of November 9, 1951, as amended by the lease agreement of August 9, 1961, as

extended, is a valid and subsisting lease on the premises described in the Complaint and herein for the same amount of space for a period of five (5) years from November 15, 1966 under the rental formula provided for in said agreement of August 9, 1961 and in any new structure if erected by the defendant corporation.

3. That this Court adjudge and declare that the defendant has breached said lease agreement because of its conduct and the arrangements made by and through its agents, Walker & Dunlop, Inc., with Grand Union.

4. That the cross plaintiff have and recover of the defendant, Mayfair Extension Incorporated, judgment in the sum of One Hundred and Sixty One Thousand Dollars ($161,000.00), besides interest and costs.

5. And for such other and further relief as to the Court may seem just and equitable in the premises.

TRAMMELL, RAND & NATHAN

By Hans A. Nathan
Attorneys for Third Party
Defendant and Cross Plaintiff

JURY DEMAND

Third party defendant and cross plaintiff demands a jury trial of the above-entitled civil action.

Hans A. Nathan
Of Counsel for Third Party
Defendant and Cross Plaintiff

[Certificate of Service, 8 Feb. 1965]

[Filed Feb. 17, 1965]

ANSWER OF DEFENDANT AND CROSS-DEFENDANT TO THIRD-PARTY DEFENDANT AND CROSS-PLAINTIFF'S CROSS CLAIM

The Defendant and Cross-Defendant, Mayfair Extension Incorporated, answers the Third-Party Defendant and Cross-Plaintiff's Cross-Claim filed herein as follows:

First Defense

The Cross Claim and Third-Party Defendant and Cross-Plaintiff fail to state a cause of action upon which relief prayed for therein can be granted.

Second Defense

1. Defendant and Cross-Defendant denies the allegation of paragraph 1 of the Cross Claim.

2. Defendant and Cross-Defendant admits the allegations of paragraphs 2 and 3 of the Cross Claim.

3. Defendant and Cross-Defendant admits the allegation of paragraph 4 of the Cross Claim except that it denies the last full sentence of said paragraph and avers that the lease agreement speaks for itself.

4. Defendant and Cross-Defendant admits the allegation of paragraph 5 of the Cross Claim and avers that the lease agreement speaks for itself.

5. Defendant and Cross-Defendant is without sufficient knowledge and belief to admit or deny the allegation of paragraph 6 of the Cross Claim and, therefore, denies the same.

6. Defendant and Cross-Defendant admits the allegation of paragraph 7 of the Cross Claim and avers that the agreement referred to therein speaks for itself.

7. Defendant and Cross-Defendant admits the allegation of paragraphs 8 and 9 of the Cross Claim.

8. Defendant and Cross-Defendant denies the allegations of paragraph 10 of the Cross Claim.

9. Defendant and Cross-Defendant admits the allegation of paragraph 11 of the Cross Claim: Answering further, Defendant and Cross-Defendant allege that said notice was cancelled and rescinded by letter dated September 10. 1964. which reads as follows:

September 10, 1964

Mr. David Luxenberg
Mayfair Supermarket
3926 Hayes Street. N. E.
Washington. D. C.

Dear Mr. Luxenberg:

"Reference is made to a letter to you dated August 5, 1964, by which you were requested to vacate the premises, which you are occupying and known as 3926 Hayes Street, N.E., on or before October 1, 1964. Kindly take this letter as notice to you that our Principal does not at this time intend to demolish the existing premises and therefore the request set forth in the referred to letter of August 5, 1964 is cancelled and of no effect.

"We wish also to reaffirm to you on behalf of our Principal, Mayfair Extensions, Inc., the Lessor of the referred to premises, which you are operating as a grocery store, that such Lessor reaffirms to you the Lease dated November 9, 1951 made between Mayfair Extensions, Inc., Lessor, and David Luxenberg and Barney Moder, Lessees, as amended, and that your Lessor under such lease intends to follow the terms required by it to be performed under such Lease, as amended."

Very truly yours,

/s/ Wallace B. Agnew
Vice President

WBA: LR

CC: Warren E. Magee, Esquire
Magee & Bulow
Suite 308, Riddell Bldg.
Washington 6, D.C.

10. Defendant and Cross-Defendant denies the allegations of paragraphs 12, 13 and 14 of the Cross Claim.

11. Defendant and Cross-Defendant admits the allegation of paragraph 15 of the Cross Claim; Answering further, Defendant and Cross-Defendant alleges that Third-Party Defendant and Cross-Plaintiff has failed to comply with that portion of the lease agreement, to wit ". . . that they will at all times keep said premises in a reasonably clean, safe and sanitary condition and will comply with all regulations of the District of Columbia applicable to the business being conducted by said lessees in said premises; that they will make all reasonable repairs in order to keep the premises in good condition and agree to surrender the premises at the expiration of said tenancy in good order, ordinary wear and tear and damage by the act of God or public enemy excepted. Said lessees specifically agree to keep all equipment, motors, refrigerators, lighting and power facilities, bins, et cetera, in repair and in satisfactory working condition during their tenancy hereof."

12. Defendant and Cross-Defendant denies the allegations of paragraphs 16 and 17 of the Cross Claim.

WHEREFORE, the premises considered, Defendant and Cross-Defendant prays:

1. That the Cross Claim of Third-Party Defendant and Cross-Plaintiff be dismissed:

2. That Defendant and Cross-Defendant be awarded a judgment against Third-Party Defendant and Cross-Plaintiff for court cost and reasonable attorney's fees:

3. And for such other and further relief as the Court may deem just and equitable in the premises.

PEED & WISE

By /s/ Joel C. Wise
Attorneys for Defendant and
Cross-Defendant

[Certificate of Service, 17 Feb. 1965]

[Filed Oct. 15, 1965]

ORDER ADDING AND ALIGNING ADDITIONAL PARTIES

Upon consideration of the oral motion made at the conclusion of all the evidence adduced at the trial of the above-entitled action by the third-party defendant and cross-plaintiff, David Luxenberg; and

It appearing that Mayfair Extension, Inc., a Maryland corporation, authorized to do business in the District of Columbia, is the fee owner of the land and the improvements thereon which is the subject of this litigation: and that sixty (60) per cent of the corporate stock of Mayfair Extension. Inc., is owned by Gospel Spreading Association, Inc., which is a non-profit religious organization and a District of Columbia corporation: and that forty (40) per cent of the corporate stock of Mayfair Extension, Inc., is owned by Elder L. S. Michaux; and that Elder L. S. Michaux is president of Mayfair Extension, Inc., and is also president of the Gospel Spreading Association; and that on May 14, 1964, a lease to the premises located in a shopping center to be constructed on the land which is the subject of this litigation was made; and that Gospel Spreading Association was designated as the landlord in said lease; and that said lease was signed by Elder L. S. Michaux as President of Gospel Spreading Association, Inc.,

It is by the Court this 15th day of October, 1965,

ORDERED, that Gospel Spreading Association, Inc., a corporation, and Elder L. S. Michaux, individually, be added as parties and aligned as defendants and cross-defendants to the above-entitled civil action; and it is

FURTHER ORDERED, that said Gospel Spreading Association, Inc. and Elder L. S. Michaux are hereby permitted to adopt the pleadings filed in the above-entitled action on behalf of defendant and cross-defendant, Mayfair Extension, Inc., and take the position, through their counsel, that no further evidence need be adduced in the above entitled action on behalf of said Gospel Spreading Association, Inc., and Elder L. S. Michaux; and it is

FURTHER ORDERED, that all Orders and Judgments entered and to be entered in this action be, and the same hereby are, declared to be binding upon said Gospel Spreading Association, Inc. and Elder L. S. Michaux.

/s/ Leonard P. Walsh
Judge

Attorneys:

James M. Cashman, Attorney for Plaintiffs
Assistant Corporation Counsel, D.C.

Joel C. Wise, Esq.
Feed and Wise, Attorney for
Gospel Spreading Association, Inc.
and L. S. Michaux

Warren E. Magee, Esq.
Of Counsel for David Luxenberg

[Filed Jan. 20, 1966]

MEMORANDUM

The matter came before the Court for hearing upon 1) Plaintiff's complaint for injunctive relief; 2) Motion of cross-plaintiff Luxenberg, to add party defendant; and 3) Cross-complaint by Luxenberg against cross-defendant Mayfair for anticipatory breach of contract.

The Court found for the plaintiff on the original action and signed the injunction order on October 27, 1965. The Court granted the third party defendant's motion to add defendant, and signed an order to that effect on October 14, 1965. The only matter now before the Court is Luxenberg's cross-complaint for damages against cross-defendant Mayfair for anticipatory breach of a leasehold agreement.

The Court finds for the cross-defendant. This case does not present an anticipatory breach

A. THE FACTS OF THE CASE

I. The Luxenberg-Mayfair Lease

On November 9, 1951, cross-defendant, Mayfair Extension, Incorporated, entered into an agreement with David Luxenberg and Barney Moder, for the lease of certain premises, known and identified as 3926 Hayes Street, N.E., Washington, D.C. The 1951 lease reads in pertinent part as follows:

> "The lesses under this lease shall have the exclusive right to conduct a food store in the present existing premises for the duration of their Lease, should said premises remain in existence, or until the present building in which said grocery store is located is demolished for reconstruction or replacement purposes. Upon the demolition of the present premises and upon completion of replacement facilities, said lessees shall have the first option to lease the food market and grocery facilities in said replacement facilities for a term at least equal to the unexpired term of this Lease, and for a percentage rental of 1/2% of gross sales, payable monthly."

This lease was modified by an agreement, dated August 9, 1961, extending and amending the terms of the original lease. This agreement reads in pertinent part as follows:

> "1. The aforesaid Lease of November 9, 1951, shall remain in full force and effect under all of its terms and conditions, except as herein otherwise provided, in favor of the herein-named lessee.
>
> "2. The term of the aforesaid Lease is hereby extended for a period of five years from November 15, 1961, with an option in favor of the lessee for one renewal of said lease for a period of five (5) years from November 15, 1966, under the same terms and conditions of said Lease as hereby amended provided that the lessee shall notify the lessor on or before

September 15, 1966, in writing of election to exercise this option.

* * *

"6. The terms and conditions of the aforesaid lease granting to the lessees therein named the first option to lease the said food and grocery facilities which might replace the existing premises after the possible demolition thereof shall remain in full force and effect in favor of the lessee except only that the rate of rental to be paid in such case shall be an amount equal to an (sic) bona fide offer which the lessor may receive from another prospective tenant under like conditions as those in favor of the lessee, and in such case (sic) the lessee shall have thirty days from the date of the receipt by him of notice of the terms and conditions of said bona fide offer within which to elect to exercise said option to lease the said replaced facilities."

By letter dated April 19, 1963, the lessee exercised his option to extend the lease for an additional five years from November 15, 1966.

The basic lease, the amendment, and the extension letter were recorded with the Recorder of Deeds on September 24, 1964.

II. The Grand Union-Gospel Spreading Lease.

Mayfair Extension, Incorporated, is a Maryland corporation, authorized to do business in the District of Columbia, and is the fee owner of the land and the improvements which are the subject of this litigation. Sixty (60) per cent of the corporate stock is owned by Gospel Spreading Association, Inc., and forty (40) per cent is owned by L. S. Michaux. L. S. Michaux is the president of Mayfair Extension, Incorporated, and is also president of Gospel Spreading Association, Inc.

Gospel Spreading Association, a non-profit religious organization, is a District of Columbia corporation.

On May 14, 1964, Gospel Spreading Association, entered into a lease agreement with The Grand Union Company, a Delaware corpora-

tion, to lease space in a shopping center to be constructed on the northwest side of Kenilworth Avenue, between Hayes and Jay Streets, Northeast, Washington, D.C. This is the same property that is the subject of the Luxenberg-Mayfair lease.

The May 14, 1964 lease between Gospel Spreading Association and Grand Union provides, among other things, that:

> "2. . . . If this lease shall be so terminated by the Tenant, then, for a period of three (3) years after such termination, the Landlord shall neither use or permit the use of the premises or any part thereof or of the Shopping Center as a food supermarket. . ."
>
> * * *
>
> "12. The Landlord covenants and warrants it has full right and lawful authority to enter into this lease for the full term herein granted and for all extensions herein provided, and that it has a good and marketable title to the premises, free and clear of all occupancies, tenancies, mortgages, liens and other encumbrances except the following: None."

III. Mayfair Repudiates, Then Reaffirms the Luxenberg Lease.

On August 5, 1964, cross-defendant, through its agent, Walker and Dunlop, wrote cross-plaintiff a letter requesting cross-plaintiff to vacate the premises on or before October 1, 1964.

On September 19, 1964, cross-defendant, through its agent, Walker and Dunlop, sent a letter to cross-plaintiff withdrawing the notice to vacate, dated August 5, 1964, and reaffirmed the aforesaid lease agreement. That letter reads as follows:

> "Reference is made to a letter addressed to you August 16, 1964, in which you were requested to vacate the premises which you are occupying and known as 3926 Hayes Street, Northeast, on or before October 1, 1964. Kindly take this letter as notice to you that our principal does not at this time intend to demolish the

existing premises. Therefore the request set forth in the referred to letter of August 5, 1964, is cancelled and of no effect.

"We wish also to affirm to you on behalf of our principal, Mayfair Extension, Inc., the lessor referred to, to premises which you are operating as a grocery store, that such a Lessor reaffirms to you the lease dated November 9, 1951 made between Mayfair Extension, Inc., lessor and David Luxenberg and Barney Moder, D.C. as amended, and that your lessor under such a lease intends to follow the terms required by it to be performed under such lease as amended."

IV. Original Premises Razed.

On September 13, 1962, cross-defendant was ordered by the Department of Licenses and Inspections, D.C., to raze the buildings in question and to clear the lots involved. That order was appealed. On March 21, 1963, a hearing was held by the Board of Appeals and Review, at which evidence and testimony were taken. On March 28, 1963, the Board of Appeals and Review sustained the order of the Department of Licenses and Inspections.

On December 18, 1964, the Board of Commissioners, D.C., filed an injunction against defendant to enforce the order of the Department of Licenses and Inspections. Defendant Mayfair Extension, Incorporated, joined David Luxenberg, the lessee, as a party defendant.

On October 27, 1965, after hearings, this Court entered an order granting the injunction and directing that the structure be razed and the lots cleared on or before February 1, 1966.

B. THE LEGAL QUESTIONS

I. Mayfair does not Assume the Obligation to Receive Luxenberg's Bid until after Completion of the Building.

The Luxenberg's lease, as modified, does not grant Luxenberg the right to demand that a building be constructed following the demolition of the present premises. If a building is constructed, the terms of the lease do not afford Luxenberg an exclusive right to conduct a food store on the new premises. Rather, he is afforded the first option to lease the food market if he can equal any bona fide offer of rental the lessor may receive from another prospective tenant.

Mayfair, Inc.. has not reached a point in which they are obligated to perform at all: their obligation rests upon contingencies not yet realized. While it is true that those contingencies depend in part upon performances which they themselves have the power to bring about; nevertheless they are under no obligation to bring them about.

The cases cited by plaintiff emphasize the fact that when there has been an anticipatory breach, the injured party need not fruitlessly perform unnecessary acts on his own part in order to sustain the action for breach. Friedman v. Decatur Corporation, (CCA 1943), 77 U.S. App. D.C. 326, 135 F.2d 812; Burke v. Thomas J. Fisher & Co., Inc., (D.C., D.C. 1955), 127 F. Supp. 1; Landvoight v. Paul, 27 App. D.C. 423, 432 (1906); Roehm v. Horst, 178 U. S. 1, 13, 20 S. Ct. 780 (1899).

This Court fully agrees with this position, but finds this question is not in issue. Defendant does not seek to defeat the claim on the basis of a lack of performance on the part of the cross-plaintiff. He seeks to defeat the claim by asserting a lack of an obligation to perform on his own part. In each case cited by the cross-plaintiff the defendant has had a continuing obligation to perform. No such obligation is present in the case at bar.

II. The Repudiation of the Lease was Retracted.

The letter of August 5, 1964, in which Walker and Dunlop, acting as agent for Mayfair, requested Luxenberg to vacate on or before October 1, 1964, is not evidence of a repudiation of the contract, for this repudiation was retracted and the lease reaffirmed by the letter of September 10, 1964. Both parties continued to perform under the reaffirmed contract. The defendant continues to affirm his intent to perform under the contract. The power of retraction of a repudiation does not cease to exist until the promisee has materially changed his position in reliance upon the repudiation. 4 Corbin, Contracts ¤950, pg. 931. The valid retraction not only restores the duty of the other party, thus making the contract enforceable, it also reinstates conditions precedent to the duty of the repudiator, so that performance of such condtions are now once again necessary before Mayfair can be charged with a breach. 4 Corbin, Contracts, 980, pg. 933.

III. Defendant Luxenberg Still has the Power to Perform his Contract.

This Court is well aware that anticipatory breach is not founded only upon the spoken words of the breaching party. Were this so, the right of action would founder ineffectively upon the false or evasive verbiage of the wrongdoer. Anticipatory breach also lies when acts evince an intention to refuse performance in the future. If Mayfair had placed themselves in a position in which performance of their promise would be impossible, that would be a repudiation of their promise and would have the same legal effect as would a repudiation in words.

In Lovell v. St. Louis Mutual Life Insurance Co., (1884) 111 U.S. 264, 42 S. Ct. 890, the plaintiff had taken out a policy of insurance with the St. Louis Mutual Life Insurance Co. St. Louis Mutual thereafter sold out to the Mound City Life Insurance Company, who took over the entire company. St. Louis no longer sought to continue under the obligation. They had put it out of their power to perform the contract. Both assets and liabilities were transferred to another insurance company.

In White v. Lumiere North American Company (1906), 64 Atl. 821, 79 Vt. 206. the defendant hired the plaintiff to manage a plant for a period of years. and then leased the plant to another company. The court held that that lease made the company powerless to perform their contract with defendant. the contract was breached, and the defendant had no obligation to serve.

In Matthews v. Minnesota Tribune Co., 10 N.W.2d 230, the employer newspaper company put it out of their power to perform the contract of employment by selling the entire newspaper facility.

In Gaspar v. United Milk Producers of California, (1944), 62 Cal. App. 2d 546, 144 P. 2d 867, the employer put it out of his power to perform the contract by selling his property.

And see Miller v. Schwinn, 72 App. D.C. 282, 284, 113 F.2d 748, 780: irrevocable dedication of land to Sanitary Commission terminates prior agreement to convey.

Thus, in each case cited the defendant was powerless to perform his contractual obligation. Further each defendant at the time of trial did not seek to assume the contractual responsibility, but sought to deny his responsibility and affirm the responsibility of the new owner.

In the case at bar, the defendant has not placed it out of his power to perform. He has not sold his property. The lease with Luxenberg still remains in effect, and Mayfair expresses an intent to continue performance under that lease. The Court recognizes that there are portions of the Grand Union lease which are incompatible with the Luxenberg lease, specifically: 1) the warranty in which Gospel Spreading gives assurance that they have authority to enter into the lease and that they have good and marketable title free and clear of all tenancies [Paragraph 12]; and 2) the provision proscribing the use of the premises as a food supermarket for three years should Grand Union terminate the lease [paragraph 2].

Thus there are now two leases which are in conflict. Since that portion of Luxenberg's lease which concerns this Court is an option,

both leases are executory so far as the right to lease the new facility is concerned. At this point, the Court is unable to determine if Mayfair intends to breach with Luxenberg or Grand Union. In his supplemental pleading to this matter, cross-defendant has for the first time indicated that "The Grand Union lease is subordinate to the Luxenberg lease" (Brief filed January 11, 1966, pg. 5).

In order to sustain a claim for anticipatory breach, that breach must be clear. There is no anticipatory breach at this time.

IV. Possible Future Litigation in this Matter.

In so holding, this Court does not intend to condone the Gospel Spreading-Grand Union agreement. At the time that agreement was made, neither Grand Union nor Walker and Dunlop (Gospel Spreading's own agent) were informed of the Luxenberg lease.

This Court will have a continuing interest in this matter. Since the Court has a background of the facts in this case, it is suggested that any future litigation which may arise from the lease might be heard by this Court.

Appropriate order to be submitted.

/s/ Leonard P. Walsh
Judge

[Filed Jan. 28, 1966]

ORDER

Upon consideration of the pleadings, the evidence adduced at the trial and Court having made its finding of fact and conclusions of law, it is this 28th day of January 1966:

ORDERED that the complaint of cross plaintiff David Luxenberg be, and the same hereby is, dismissed.

/s/ Leonard F. Walsh
Judge

[Excerpts of Proceedings, Sept. 13, 1966 and Sept. 14, 1965]

Washington, D. C.
September 13, 1965

The above-entitled cause came on for hearing at 10 a.m., before the HONORABLE LEONARD P. WALSH, Judge.

APPEARANCES:

JAMES M. CASHMAN, ESQ.,
For Plaintiffs.

JOEL WISE, ESQ.,
For Defendants and Third Party Plaintiffs.

WARREN E. MAGEE, ESQ.,
For Third Party Defendant.

[2] MR. WISE: Defendant Mayfair Extension, Incorporated, rests.

THE COURT: All right.

MR. MAGEE: I would like to call as my first witness Mr. Michaux, President of Mayfair Extension, Incorporated.

Thereupon,

LIGHTFOOT SOLOMON MICHAUX

a witness called by counsel for the Third Party Defendant, having been duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MAGEE:

Q. Give your full name, if you will, sir. A. Lightfoot Solomon Michaux.

Q. And your residence? A. 1712 R Street, Northwest.

Q. Now, Mr. Witness, are you the president of the Gospel-Spreading Association, Inc.? A. Beg pardon?

Q. Are you the President of the Gospel-Spreading Association, Inc.? A. Yes, sir.

* * *

[4] Q. Mr. Witness, I show you a document which has been marked Defendant exhibit 2 for identification and I turn to the first document which is captioned "Lease," and it is dated November 9, 1951, and I ask you to identify the signature of the person who executed that document on behalf of Mayfair Extension, Inc.? A. You mean the signature?

* * *

Q. I ask you who executed this document at that time on behalf of Mayfair Extension, Inc.? A. The time of that is what?

Q. November 9, 1951. A. The signature you are referring to?

Q. Yes. A. Do I know that signature?

[5] Q. Yes. A. Mr. Albert Cassell.

THE COURT: Wait just a moment.

Now, step over here, will you? You see, the witness then will talk to you.

BY MR. MAGEE:

Q. Repeat the name of the party who signed this document on behalf of Mayfair Extension, Inc.? A. His signature looks like Albert I. Cassell's. I could not say.

Q. Is it not true that Mr. Albert I. Cassell was Executive Vice President of Mayfair Extension, Inc., at that time? A. You mean when he signed that?

Q. When he signed this lease on November 9, 1951. A. I really do not remember, to be frank.

Q. What position did you hold in Mayfair Extension at that time? A. The same as I hold now.

Q. You were president at that time? A. That is correct.

Q. Now, I show you a second document, Mr. Witness, which is in this particular exhibit, and direct your attention to the signature which was annexed to this document on the 9th day of August, 1961, and ask you who signed that document on behalf of Mayfair Extension, Inc.? A. L. S. Michaux.

[6] Q. And you are L. S. Michaux, are you not, sir? A. Yes, sir.

Q. And I assume you were authorized to execute this document on behalf of Mayfair Extension, Inc.? A. You mean Gospel Spreading?

Q. Mayfair Extension, Inc., is the signatory to that document, sir. A. You are asking was I authorized to sign?

Q. Yes. sir. for Mayfair Extension, Inc. A. Well, is this the document that was prepared by Walker & Dunlop?

Q. This, Mr. Witness --

THE COURT: Wait just a moment. We will declare a few moments recess, and the witness can confer with counsel. Let's move on with this. Is this all a surprise to you?

THE WITNESS: Somewhat, yes, sir.

THE COURT: We will take some time and you take a look at it. The Court understands that the Gospel Spreading Association, that you are president of, is that correct?

THE WITNESS: Correct, yes, sir.

THE COURT: And you are also president of Mayfair Extension, Incorporated?

THE WITNESS: Yes, sir.

* * *

[11-A] BY MR. MAGEE:

Q. Mr. Witness, as I understand the situation, you, as president are authorized to bind Gospel Spreading Association, is that correct? A. Yes, sir; that is correct, as president.

Q. You are the Chief Executive Officer of Gospel Spreading? A. Correct.

Q. And you are the president of Mayfair Extension, Inc., as well? A. Correct.

Q. Under your present setup you are the Chief Executive Officer of Mayfair Extension Corporation? A. Will you repeat that?

Q. You are also the Chief Executive Officer of Mayfair Extension, Inc., as its president? A. That is right.

MR. MAGEE: No further questions on this, your Honor.

THE COURT: All right.

THE WITNESS: May I make a statement?

[12] THE COURT: Certainly.

THE WITNESS: The Gospel Spreading Association is a religious organization. We are in the soul-saving business.

The Mayfair Extension is a commercial organization.

BY MR. MAGEE:

Q. Owned by, sixty per cent by Gospel Spreading Association and forty per cent by you, personally? A. Extension, yes.

Q. Yes. A. Correct.

THE COURT: We are not concerned with that. We are concerned with Gospel Spreading Association, Inc.

THE WITNESS: Yes.

THE COURT: You are president of that?

THE WITNESS: Yes, sir, I am president of Gospel Spreading Association, yes.

THE COURT: You are authorized to act in the name of Gospel Spreading Association?

THE WITNESS: By Gospel Spreading Association, I am.

THE COURT: The what?

THE WITNESS: By the organization, or the members of the Gospel Spreading Association; I am authorized to act for Gospel Spreading.

* * *

[20] DAVID LUXENBERG

Third Party Defendant, appearing as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MAGEE:

Q. Mr. Luxenberg, give us your full name and residence. A. David Luxenberg, 617 Quintana Place, Northwest.

Q. I show you what has been marked as Defendant's Exhibit 2 for identification. I call your attention to the first document in this exhibit and ask you if you can [21] identify the signatures on that document? A. Albert I. Cassell.

Q. Do you know him? A. I do.

Q. At the time this agreement was negotiated with whom did you deal in Mayfair Extensions, Inc.? A. Albert I. Cassell.

Q. And in what capacity was he representing Mayfair Extension at that time? A. As Executive Vice President.

Q. Now, who signed it on behalf of the lessee? A. Barney Moder.

Q. Who else? A. David Luxenberg.

Q. Who was Barney Moder? A. My partner, and brother-in-law.

Q. Now, referring to the agreement which is also a part of this exhibit dated August 9, 1961, I ask you who executed that agreement on behalf of Mayfair Extension, Inc.? A. It looks like I. S. Michaux.

Q. Is that an "L."? A. Or an "L."

Q. As president at that time? [22] A. That is right.

Q. And it is also executed by you? A. Exactly.

Q. And it bears a corporate seal? A. And by Mr. Jones.

Q. And the seal is affixed? A. Correct.

Q. There is a third document which is a letter of April 19, 1963. You signed the original of that and forwarded it to Mayfair Extension extending the lease from November 15, 1966, extending it for five years? A. I did.

Q. Were these documents placed of record among the land records of the District of Columbia? A. Yes, they have been.

MR. MAGEE: I offer this as Defendant's exhibit No. 2 in evidence. They were all initialed at the --

THE COURT: Any objection?

MR. WISE: No objection.

THE COURT: It will be received without objection.

(Defendant Luxenberg Exhibit 2 received in evidence.)

MR. CASHMAN: I have no position with respect [23] to this dispute.

THE COURT: Defendant Luxenberg's exhibit 2 in evidence.

BY MR. MAGEE:

Q. Mr. Luxenberg, you are to pay for good will of $15,000 in installments, is that correct?

MR. WISE: Objection. It speaks for itself.

MR. MAGEE: I want to know whether it was paid.

THE WITNESS: We have --

MR. WISE: Your Honor, we have not established a breach.

THE COURT: The objection will be overruled. The witness can answer.

THE WITNESS: I did.

BY MR. MAGEE:

Q. And how much was paid for the good will? A. $15,000.

Q. Did there come a time when you purchased out the interest of your partner, Mr. Moder? A. There did.

Q. And then when the new agreement, did you pay a consideration for that purchase? A. I did.

Q. How long did you and Mr. Moder operate the grocery [24] store under the lease which is a part of defendant's exhibit No. 2, Luxenberg after you entered into the first lease, approximately? A. From 1952 to 1955, and I operated from then on, myself.

Q. Did you pay Mr. Moder any consideration for the good will that accumulated in that time? A. I did.

THE COURT: The same objection.

MR. MAGEE: Sorry, Your Honor.

MR. WISE: He is asking the question, how much he paid a partner of his to buy him out.

MR. MAGEE: We think it is an element of damage, your Honor. Later we will tie it up. He said he paid 5,000 for that, is that correct?

THE WITNESS: 5.000. yes.

BY MR. MAGEE:

Q. There were certain fixtures described in a schedule. Did there come a time when you purchased the fixtures described in the schedule? A. There did.

Q. How much did you pay to Mayfair Extensions, Inc., for the fixtures? A. $1,000.

[25] Q. Now, Mr. Luxenberg, over the past four years you have been operating a grocery store under the Extension Provisions of this lease, is that correct? A. That is right.

Q. Now, can you tell us what your gross profit was in 1961 from the operation of the grocery store? A. $13,000.

Q. And is that gross to you, before taxes, is that what you mean? A. It would be about $10,000 after we had our inventory in 1964 adjusted.

Q. We will get to that. In 1962 can you give the Court what you took in in gross profits from operating under the lease -- 1962, sir? A. About twelve, twelve-two, or twelve-five.

Q. Now, in 1963, what was your gross profit? A. In 1963?

Q. Yes. A. It was about $ 12,000 then.

Q. Now, that brings us up to -- did you give it to us for 1963? A. About $12,000, yes.

Q. Do you have a figure for 1964? A. About ninety-some-odd hundred dollars, because we [26] made an inventory adjustment.

Q. What would have been your average gross profits for those four years, 1961, 1962, 1963 and 1964 annually? A. About $10,200 or $10,-300.

Q. Now, assuming that you had been given the opportunity to operate in the same size space -- by the way, how much space was rented to you? A. About 2500 feet.

Q. Square feet? A. That is right.

Q. Now, the agreement provides for the payment of rent always. Have you paid the rent always under the agreement to date? A. I have.

Q. Now, assuming that you were given the right to operate in a new building with the same amount of space if the old building is torn down and reconstructed, in your opinion, having been in the grocery business, do you feel that you would make a profit?

MR. WISE: Objection.

MR. MAGEE: If you had available to you $2500 in your opinion as a grocery man?

THE WITNESS: Do you mean 2500 square feet?

[27] BY MR. MAGEE:

Q. Yes, feet. A. I sure would.

MR. WISE: This is purely speculation on the part of the witness.

THE COURT: The Court feels that it is.

There is no question if the price of groceries keeps going up, that he would.

MR. MAGEE: Will the witness be permitted to answer the question, your Honor?

THE COURT: No, the Court is not interested. The Court feels that it would be pure speculation.

MR. MAGEE: In that regard, I would merely offer as proof for the record if permitted to answer he would earn at least $10,000 per annum that he is now earning. I make that as a proffer.

THE COURT: All right.

BY MR. MAGEE:

Q. Now, Mr. Luxenberg, I call your attention to page 2 of the original agreement and lease which was dated back in November 9 of 1951, and ask you whether or not this lease gave you the exclusive right to conduct a grocery business in your rented space? A. It was understood that I would have the exclusive [28] right.

Q. And the lease so provides? A. The lease so provides, yes.

Q. And the lease also provides that in the event the building is demolished for reconstruction purposes, you are to be given the first

option to lease quarters in the new building, is that correct? A. Exactly so.

Q. Now, when the lease agreement was extended by the agreement, which is part of the same exhibit, dated the 9th day of November, 1961, were you also given the right to lease and have the first option to lease like space? A. Like space, like conditions, except for the fact that a bona fide rental order would have to be met.

Q. And are you willing to meet a bona fide rental, based on the same amount of space which you are now? A. I am willing to meet a bona fide offer and am willing to pay it. I have until today.

Q. Now, today for the first time you saw, did you not, Mr. Luxenberg, your exhibit No. 1, which is the lease to Grand Union, is that correct? A. That is right.

* * *

[30] Q. Has actual construction been started? A. Yes. I would say it is about 25 or 30 per cent completed.

Q. This is Mayfatr Extension Development, is that right? A. That is right.

MR. WISE: Objection. Not Mayfair Extension Development at all. It is a non-profit corporation which is sponsored by the Gospel Spreading Association to provide housing for low and moderate income under 221 (D) 3 of the National Housing Act and has nothing to do with Mayfair Extension as such.

THE COURT: All right.

MR. MAGEE: I think this should be put in as evidence. The title is vested in Mayfair Extension, according to our research.

THE COURT: All right.

BY MR. MAGEE:

Q. Now, Mr. Luxenberg, you have been operating a grocery store in this area for how many years? A. Close to 25 years.

Q. And you are familiar with the area, including the present build-

ings which are in the area, the number of families that are in the area? A. Yes, sir.

* * *

[32] Q. And how much space was involved in your discussions with Mr. Cassell? A. Well, like conditions. We would have the exact same facilities and we would not have any change.

MR. MAGEE: That is all.

MR. WISE: Your Honor please, the discussions between Mr. Cassell and Mr. Luxenberg, if they are not included in the four corners of that lease agreement, I object to them.

THE COURT: All right.

MR.MAGEE: No further questions with regard to Mr.Luxenberg, your Honor.

MR. WISE: May I have Exhibit No. 2?

CROSS EXAMINATION

BY MR. WISE:

Q. Mr. Luxenberg, I hand you cross plaintiff's exhibit No. 2, which is a lease between Mayfair Extension, Inc., and David Luxenberg, and Mayfair, which -- and Moder, which was amended by an agreement dated the 9th day of August, 1961, and thereafter extended by a letter dated April 19, 1965. I will ask you if that is the lease --

THE COURT: 1966, or 1965?

MR. WISE: 1966, yes. I ask you if that is the lease that you presently occupy the premises on.

THE WITNESS: Correct.

* * *

[35] REDIRECT EXAMINATION

BY MR. MAGEE:

* * *

[36] Q. Now, what average rental per year were you paying for the space you occupied? A. About $3800.

Q. And did you ever agree to have this increase of rent to $27,000 as proposed in that letter? A. No, sir.

MR. MAGEE: I would like to have this marked so it stays a part of the record, as our next exhibit for identification.

THE COURT: It will be so identified.

MR. WISE: I have no objection to its being in evidence.

* * *

[44] FURTHER REDIRECT EXAMINATION

BY MR. MAGEE:

Q. You mentioned an opportunity to sell? A. Yes, sir.

Q. Would you please mark this as our next exhibit for identification?

DEPUTY CLERK: Defendant Luxenberg's exhibit No. 4 for identification.

(Defendant Luxenberg's Exhibit No. 4 marked for identification.)

BY MR. MAGEE:

Q. Mr. Luxenberg, I am going to show you what has been marked Defendant's Exhibit 4 for identification and ask you whether you can identify it. A. Yes. This is a bill of sale between Leon Beck and myself to sell the business.

Q. Now, was this bill of sale submitted to Mayfair Extension for their approval? A. Well, the transfer was submitted to them but never with -- never was approved.

Q. Did they ever approve it so you were able to sell it? A. Never.

Q. So you were unable to sell it? A. Yes.

* * *

[46] Thereupon

RICHARD WATKINS

a witness called by counsel for Defendant Luxenberg and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MAGEE:

Q. Mr. Watkins, give us your name, address and occupation or profession, sir, please? A. My name is Richard Watkins. I am employed by Henry M. Wilder, CPA, at 4010 Bladensburg Road in Brentwood, Maryland. I am a certified public accountant, also

Q. Have you had occasion to examine the books and records of Mr. Luxenberg who sits here in Court as defendant today in regard to the operation of his grocery business at Hayes Street and Kenilworth Avenue, Northeast? A. Yes. I prepared the 1963 returns and I reviewed the 1964 returns.

Q. Now, going back to 1961, without putting in all of these figures, can you tell the Court please what was his gross profit for 196 --

THE COURT: I thought the witness said 1963.

MR.MAGEE: He has them back to 1961.

THE WITNESS: I have the returns back to 1961, your Honor.

[47] MR. WISE: I would object,your Honor, on the same basis, a continuing objection as with respect to the proof of damages when they have not proved a breach of contract yet.

THE COURT: Overruled.

MR. MAGEE: To save time, instead of putting in the returns, I will ask based upon the examination of the books and records, can you tell us what his gross profits was in 1961?

THE WITNESS: The gross profit figure that I am giving for 1961 is taken from U.S. Partnership return of Income, the Gross Profit is $12,014.50. But --

BY MR. MAGEE:

Q. Now, was there any depreciation taken for example on equipment which is actually money in the pocket of a taxpayer? A. Right. Depreciation taken on equipment would be $1830.10.

Q. So, actual money profit to Mr. Luxenberg, including deprecia-

tion allowances is what for 1961? A. To Mr.Luxenberg and his son this would be, in 1961, a total of roughly $13,800.

Q. Now, can you give us the same figures for 1962?

THE COURT: He said gross, did he?

[48] MR. MAGEE: Yes, sir, this is before taxes, your Honor, that is all.

THE COURT: What is net?

THE WITNESS: When he refers to gross, what he is doing is taken the net income. This is after all deductions, and adding to it the depreciation expense.

THE COURT: This is all operating?

THE WITNESS: Right,this is operating profit, plus adding back the depreciation.

THE COURT: No, I am talking about the fact that Mr. Magee asked you what the gross was.

THE WITNESS: The gross profit would be $49,500. Using the term as it was used on the income tax form.

THE COURT: Now the net includes --

THE WITNESS: It includes all the deductions for salaries, rents, interests, taxes, and so forth.

THE COURT: All right.

BY MR. MAGEE:

Q. And this figure comes out of the net. In other words, to the taxpayer, your Honor, is the $13,800 figure.

THE COURT: Then that is net.

MR. MAGEE: Yes,but it is before the Federal taxes are taken out of it. That is all I am saying, Your Honor.

[49] THE COURT: All right.

BY MR. MAGEE:

Q. Now, can you give us that same figure for 1962, Mr.Witness? A. The figure for 1962, the net income as shown by the tax return is $12,402.22.

Depreciation would be $1240.07.

By combining those two figures it comes up to a total of $13,600, roughly.

Q. What is the situation in 1963 with regard to the same question? A. The figures as shown by 1963 return, net profit $8,778.07. Depreciation $695.87 for a total of roughly $9400.

Q. Now, in 1964, I would like to ask you for the same figure, and an explanation of it. A. Net profit as shown by the return is $1,048 and 60 cents. The depreciation is $2,250.41.

Q. Now, would you please explain why there is a difference in 1964 from 1961, 196 and 1963. A. Right. This figure comes up to roughly $3300, prepared with the others. The reason for this is the fact that Mr. Luxenberg did not take a physical inventory until the end of 1964, he did not take a physical inventory in 1962 and 1963, and in 1964 when he did take the physical inventory, [50] we found there was an adjustment required to make the books agree with the physical inventory.

Q. And this adjustment then, taking into account the adjustment, what would be the average? Is this a bookkeeping adjustment? A. It was a bookkeeping adjustment, right. Technically it should have been spread back over the four year period because it did relate to two other years.

Q. Now, spreading it back over the four-year period as you say it should have been originally, but it was not done through bookkeeping error or errors, what would be the average profit per year for the years 1961, 1962, 1963, and this year 1964 as adjusted? A. We calculated an average, a few moments ago we calculated an average profit of $10,060, excluding a deduction for depreciation.

Q. Thank you.

* * *

[66] WALLACE B. AGNEW

a witness called by counsel for Third Party Defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WISE:

Q. Mr. Agnew, will you advise the Court of your full name and address and your employment. A. My name is Wallace Agnew.

I am vice president of Walker & Dunlop, Inc., 905 Sixteenth Street, Northwest.

My part of the company is handling all real estate matters.

* * *

[67] MR. MAGEE: Yes, sir. We have no objection to Mr.Agnew's qualifications in the real estate field.

MR. WISE: He is an expert in the field of commercial leasing.

THE COURT: Yes.

The record will reflect that Mr. Agnew is an expert in that particular field.

* * *

[78] CROSS EXAMINATION

BY MR. MAGEE:

* * *

Q. How long prior to September of 1964 had you been negotiating for a lease with Grand Union on behalf of whoever your client was?
[79] A. Well, I started out with Grand Union and then I dropped them. I thought I could make a better deal with Safeway.

Then I found that I could not, and I went back to Grand Union. My opinion is that I was negotiating on that site for a year or a year and a half before.

Q. Now, I notice that you use the term in your correspondence that you were the agent for the lessor. A. Yes, sir.

Q. You were the authorized agent, authorized to negotiate a lease of these premises? A. Yes.

Q. Now, who gave you that authority? What individual and on behalf of whom did you get your original authority to negotiate the lease? A. Only one person: Elder Michaux.

Q. Now, in whose name were you instructed to negotiate this lease prior to September 30, 1964, Mr. Agnew? A. That is a difficult question, becuase I really do not know. But having had experience with Elder Michaux, we have a large loan on the premises adjoining -- I just never -- I assumed this whole piece of property, you see it once was under FHA. I know we refinanced it and I assume Mayfair, the [80] Gospel Spreading Association made an extension of the loan, I believe. I am not certain.

Q. Well, you did negotiate a lease, is that correct? A. That is correct, yes, sir.

* * *

[83] Q. To make it very clear then, the file with the exception of the Grand Union lease, was delivered in September then of 1964 or thereabouts? A. Yes.

Q. Now, in that file were the two exhibits which you identified this morning, were there not, Mr. Agnew, Defendant's Mayfair No. 1 and No. 2? A. Right.

Q. And Mr. Wise produced those and you identified them as letters which you have written, is that correct? A. Correct.

Q. Now, Mr. Agnew, I show you Defendant's exhibit 1, Luxenberg, which has been received in evidence, which purports to be a lease dated May 14, 1964. I ask you to look at it and tell us whether that is the lease, a copy of which you have just delivered to Mr. Wise recently? [84] A. It looks to be the same.

Q. And this is the lease which you negotiated under Mr. Michaux' instructions prior to May 14 of 1964? A. Well, we had been working

prior to that. I said. We had been trying to get the lease, get an offer on this property for a long time.

Q. Now, under whose instructions did you have this lease executed in the name of Gospel Spreading Association, Inc., and why was their name put on the lease? A. Well, that is a good question. It was typed up this way. And that would have to be my instructions. Nobody also had anything to do with it.

I told the Grand Union people, I did the entire negotiating. I told the Grand Union people who prepared this lease. Ordinarily our legal department prepared our leases. But the Grand Union Company insists on preparing their own leases.

As you can see, we made many, many, many changes in this lease before we would execute it. That went over a period of months of negotiating.

The Elder signed it and I had to get the Gospel part -- I would not have any other place to get the information than from my principal.

Q. Then, as I understand your testimony, Mr. Agnew, this [85] lease was drawn in the name of Gospel Spreading Association, Inc., under the instructions of its president, Mr. Michaux, is that correct? A. Well, I answer the question because I would not know any other way to answer it.

Q. In other words, you got all of your instructions in regard to the preparation of this lease on behalf of your principal from Mr. Michaux, right? A. Not the negotiating, but the ownership and the signing of the lease. It is signed, so it is obvious --

Q. That he gave the information in it.

You are a lawyer, are you not, as well as a real estate expert? A. I am not a practicing lawyer as such.

Q. This lease contains a warranty that the title of this property is vested in Gospel Spreading Association, does it not, sir? A. Right, it does, somewhere in there. Every lease has that. You have the author-

ity to make the lease and have the authority, that they have good title to the property and that is in every chain store lease.

Q. You were informed by your principal, Gospel Spreading Association, Incorporated, acting through its president, Elder Michaux? You had the information that the title was in [86] was in the Gospel-Spreading Association and you so certified to that in the lease, did you not, sir? A. Yes.

Q. Now, Mr. Agnew, as the agent representing Gospel-Spreading Association, whom you had been informed was the owner of this property on May 14, 1964, did you ever receive under paragraph 43 of this lease any notice that Grand Union was cancelling the lease? A. No, sir. I got a letter from Grand Union asking us to extend the time, and because we would be unable at that point, the problems had started to arise, and so we -- I told them by telephone, that I would be unable to do anything with this lease, to Grand Union, at the time a problem had arisen because of some legal difficulties with the present tenant, and so we did not answer that letter. We just told them by phone we could not.

Q. But Grand Union has never canceled? A. No, they have not canceled, I doubt if they would.

Q. And to your knowledge does not Grand Union still, as far as you know, consider it has a lease of these premises and wants this space if it is built? A. They feel that they want this site, and they feel that they would like to have it. That is the only way to put it.

Q. Now, Mr. Agnew, let us turn to another little [87] problem. The problem which had arisen in regard to the Grand Union lease occurred because, for the first time after August of 1964 you were first advised of the existence of the Luxenberg lease, is not that true? A. I knew of the Luxenberg lease, but not of the amendment, the extension.

Q. You were negotiating on the theory that there was no prior lease on these premises, were you not, sir? A. Well, at that point --

yes. I knew there was a lease. But I had never seen at that point the extension of the present Luxenberg lease. itself.

Q. So, you learned then for the first time in September or a little prior to that time. of 1964. the terms of the Luxenberg lease, is that correct? A. The exact terms. yes.

Q. And you learned those terms in a conference which you have described? A. With you.

Q. Which I attended and Mr. Michaux attended and your lawyer, Mr. Sawtelle attended? A. That is when I really got the word.

Q. Seeing that lease. you then realized that the letter which you had sent out in August as you put it, was a mistake? [88] A. That is why I followed it up with the second letter.

Q. So, you followed up with the second letter? A. Right.

Q. Telling him that he did not have to vacate in effect, right? A. Right. Right.

Q. Who instructed you to write that first letter, telling him to vacate the premises? A. Well, Elder left most of these things up to me and -- to Mr. Sawtelle and myself.

* * *

[98] THE COURT: Well, let me ask you this. You are one of the recognized real estate men in the City of Washington, and have been for a long period of time.

THE WITNESS: Yes, sir.

THE COURT: Now, you were sent out to draw up a lease with Grand Union, when, in reality, a lease was already in existence with --

THE WITNESS: With Mr. Luxenberg?

THE COURT: Yes, with an extension on it.

THE WITNESS: Right.

THE COURT: And you had no knowledge of it?

THE WITNESS: I had knowledge of the lease but not the extension. You see, with the lease --

THE COURT: Now, when you did find out about the extension --

THE WITNESS: Yes, sir.

THE COURT: Weren't you concerned with Grand Union?

THE WITNESS: I explained it to Mr. Longchampe, and we discussed this many times. This whole thing.

He said, "Well, we would like the store if we can get it. If we can't get it, we can't get it."

I said, "Well, you can't get it now under these conditions."

[99] Again he sent an extension agreement from the legal department in Patterson, New Jersey, and that is still—I gave it to the Elders and it is just filed. We just told him we could not extend the time. The extension means the time for the completion of the store.

THE COURT: Yes. Now, during the entire period of time that you were dealing with Grand Union or with any other prospective party, did you ever deal with Mr. Luxenberg?

THE WITNESS: I talked to him on the phone I think. He called me a couple of times.

THE COURT: But you did not go over to talk with him?

THE WITNESS: I did not speak with Mr. Luxenberg because, as soon as I wrote that letter, I heard from Mr. Magee and Mr. Magee, recognizing that Mr. Magee was his attorney, I did talk to Mr. Luxenberg, come to think about it. But I do not believe I saw Mr. Luxenberg in person. I think we talked on the telephone.

THE COURT: Well, you knew that Mr. Luxenberg had the first --

THE WITNESS: Yes, I knew he had the right of refusal. But also under that lease we have the right to get an offer to determine what was the best deal we could get.

THE COURT: Well, let us get down to the practical side of it.

THE WITNESS: Yes, sir.

[100] THE COURT: If you had knowledge that Mr. Luxenberg had the extension that would go into 1971, and that he had the first right on the properties if erected --

THE WITNESS: Right.

THE COURT: -- certainly you would have told Grand Union that fact?

THE WITNESS: Yes. right: right.

THE COURT: And it would have been included in the lease?

THE WITNESS: Right, right.

* * *

[106] BY MR. MAGEE:

Q. Now, as I understand it, these negotiations, and the execution of the lease, this final question was done by you on the information furnished you by Mr. L. S. Michaux, that Gospel-Spreading was the owner of the property you were dealing with, and you so stated in the lease? A. Stated it in the lease and we signed it as such.

* * *

LEASE

Made by and between MAYFAIR EXTENSION, INCORPORATED, a Maryland corporation, doing business in the District of Columbia, lessor, and DAVID LUXENBERG and BARNEY MODER, of Washington, D. C., lessees;

WITNESSETH, That the lessor does hereby let and demise to the lessees premises known and described as 3926 Hayes Street, N. E., being the completely equipped Super Market located in said premises, for a term of five years, terminable as hereinafter provided, which term shall commence November 15, 1951 (if possession is delivered before or after November 15, 1951 the first month's rent shall be prorated and adjusted accordingly) and shall terminate on November 16, 1956, with an option of five additional years in said lessees provided they receive notice in writing to the lessor of their intention to remove this Lease on or before August 15, 1956, at a monthly minimum rental of One Hundred and Seventy Five Dollars ($175.00), which is based upon a gross value of business of $3,000,00 per week, and an additional rental will be paid on all of the gross volume over and above $3,000.00 per week, computed at the rate of 1-1/2% of said excess over said $3,000.00 in gross business per week.

Said lessor is to have full access to books and records of said lessees for the purpose of determining the amount of gross business conducted in said premises.

The lessees agree to pay for the good will of Mayfair Extension, Incorporated, in the grocery business heretofore conducted in said premises, the sum of Fifteen Thousand Dollars ($15,000.00), payable $5,000.00 in cash upon the execution of this Lease and the balance of $10,000.00, which is to be evidenced by a promissory note of said lessees with interest at the rate of 5% per annum, payable in equal monthly installments over a period of thirty-six months. This good will will vest in the lessees upon the execution of this Lease, free and clear of

all debts and encumbrances of the lessor and is hereby assigned to the lessees by this Lease as part of the consideration therefor.

Included in the terms of this Lease, the possession of which will be delivered to the lesses on the execution of this Lease, are all fixtures and equipment now utilized in the aforesaid grocery business as conducted by the lessor, including a Chevrolet Panel Delivery Truck, which fixtures and equipment are set forth on an itemized list which is attached to this Lease, marked Exhibit A. All fixtures and equipment, as well as said truck, are delivered into the possession of the lessees under the terms of this Lease, subject to the lien of approximately $308,000.00 in favor of the Reconstruction Finance Corporation.

The lessees are hereby given an option to purchase all of the foregoing fixtures and equipment and said truck at any time during the pendency of this Lease after the expiration of two years from the date of this Lease. If this option is exercised at any time within the third year of this Lease, the purchase price for said fixtures, equipment and truck shall be $10,000.00 in cash; if said option is exercised after the expiration of the third year of this lease, then the purchase price shall be $7,500.00 in cash.

Said lessees shall have the right to make substitutions or replacements of part or all of said fixtures, equipment and truck and shall have the right to use any or all of said fixtures and said truck as a down payment or down payments toward the purchase of new fixtures, equipment or truck, provided that in each substitution and replacement of part or all of said fixtures, equipment and truck, the terms thereof and the arrangements therefor be first approved in writing by the Reconstruction Finance Corporation, or its successors or assigns. Title to any such newly acquired fixtures, equipment or truck, on acquisition, shall vest in the lessor.

Should the lessees exercise their option to purchase, and shall purchase, all of said fixtures, equipment and truck for the sum of $10,000.-00 or the sum of $7,500.00 as provided herein, title thereto shall vest in

the lessees, their successors and assigns, free and clear of all liens and encumbrances whatsoever, including that of the Reconstruction Finance Corporation.

The lessees under this Lease shall have the exclusive right to conduct a food store in the present existing premises for the duration of their Lease, should said premises remain in existence or until the present building in which said grocery store is located is demolished for reconstruction or replacement purposes. Upon the demolition of the present premises and upon completion of replacement facilities, said lessees shall have the first option to lease the food market and grocery facilities in said replacement facilities for a term at least equal to the unexpired term of this Lease, and for a percentage rental of 1-1/2% of gross sales, payable monthly. The minimum guaranteed rental payable under the Lease for such new and replaced premises shall be adjusted annually so as to provide for the payment of a minimum guaranteed monthly rental based upon 75% of the gross business for each year against 1-1/2% of gross sales. By this provision it is intended by the parties to provide for an increase in the guaranteed minimum percentage rental and it is meant thereby that the lessees' minimum guaranteed rental under the new lease would be based upon 75% of the gross volume for each preceding year but is not in any manner intended to decrease the obligation for the payment of a minimum of 1-1/2% on the entire gross volume of sales during the entire lease period or periods.

The lesses agree and covenant that they will not sell or attempt to sell any alcoholic beverages of any kind during the existence of this Lease or any renewals thereof or under any Lease executed to cover premises leased in replacement premises, and the said lessees covenant that they will not carry on any business in said premises except a general food and marketing business, and that they will not sub-let the said premises or assign this Lease in all or in part without the consent in writing of the lessor and the approval thereof of the Reconstruction

Finance Corporation: that the lessees will not use said premises for disorderly or unlawful purposes: that they will pay the aforesaid rent as above stated and will pay all bills for gas, electricity and telephone service used on the premises, making the necessary deposits at the respective offices to secure the same; that they will pay their proportionate share of the water rents for said premises during the tenancy thereof; that all repairs rendered necessary by the negligence of the lessees, its servants, agents or employees, shall be paid for by said lessees; that they will at all times keep said premises in a reasonably clean, safe and sanitary condition and will comply with all regulations of the District of Columbia applicable to the business being conducted by said lessees in said premises; that they will make all reasonable repairs in order to keep the premises in good condition and agree to surrender the premises at the expiration of said tenancy in good order, ordinary wear and tear and damage by the act of God or public enemy excepted. Said lesses specifically agree to keep all equipment, motors, refrigerators, lighting and power facilities, bins, et cetera, in repair and in satisfactory working condition during their tenancy hereof.

PROVIDED, that if the lessees shall fail to pay said rents in advance as aforesaid, although there shall have been no legal or formal demand for the same, or shall neglect to pay the electric, water rent, gas or telephone bills, or any other bills they are obligated to pay under the terms of this Lease, on the day when the same shall fall due and be payable, or shall sub-let or assign said premises or carry on any business therein except that of a general food, market and grocery business as aforesaid, without the written consent of the lessor and/or the Reconstruction Finance Corporation as aforesaid, or shall use the premises for any disorderly or unlawful purpose, or break any of the aforesaid covenants, either in or out of the said premises, or violate any regulations of the District of Columbia applicable thereto, then and in either of said events this Lease, and all things herein contained, shall cease

and determine and shall operate as a Notice to Quit, all other notices to quit being hereby expressly waived, and the said lessor, or its successors or assigns, shall and may proceed to recover possession of said premises under and by virtue of the provisions of the Code of Law for the District of Columbia regulating proceedings between landlord and tenant.

AND IT IS FURTHER PROVIDED that if, under the provisions of this Lease, a summons shall be served and a compromise or settlement shall be made thereupon, it shall not constitute a waiver of any covenant herein contained. And the said lessees hereby agree to deliver the premises in the same order in which they were received, usual wear and tear, fire and storm excepted, unless such fire damage shall have been caused by the negligence of said lessees, their servants, agents and employees, in which event said lessees shall be liable for all fire damages ensuing therefrom. And it is also hereby agreed that no waiver of one breach of any covenant herein contained shall be construed to waive or in any manner affect the covenants of this Lease.

IN WITNESS WHEREOF, Mayfair Extension, Incorporated, does hereby nominate, constitute and appoint Albert I. Cassell as its attorney in fact to execute and acknowledge this Lease in its corporate name.

IN WITNESS WHEREOF, the said parties have hereunto signed their names and affixed their seals this 9th day of November, A. D., 1951.

MAYFAIR EXTENSION, INCORPORATED
/s/ Albert I. Cassell, Executive Vice-President, LESSOR. (SEAL)

Attest:
Warren E. Magee, Sec.

/s/ David Luxenberg
/s/ Barney Moder, LESSEES. (SEAL)

The terms of the foregoing Lease are hereby approved and consented to.

RECONSTRUCTION FINANCE CORPORATION
By _____

This agreement and the rights of the parties hereunder are expressly made subject to the prior rights in favor of Reconstruction Finance Corporation under its recorded Deed of Trust.

[Verification of Albert I. Cassell and David Luxenberg]

November 10, 1951

Fixture Inventory — Mayfair Extension Market
3926 Hayes St., N.E.

3 Outside Neon Signs
2 Vegetable Weighing Scales
2 National Cash Registers (Check Out)
2 Checkout Counters and Back Bars
1 Small Fan
2 Class Display Racks
1 Mirrored Back Vegetable Stand
1 Ranging Scale
2 Electric Signs
6 Gondolas
3 Wall Shelving
2 Frozen Food Cases
1 Dairy Case
1 Fish Case (Hill)
1 Meat Saw (Electric Band Saw)
1 Meat Display Case (Hill)
2 Computing Scales
1 National Cash Register
1 Hobart Slicer
2 Safes
1 Steak Maker
1 Hobart Meat Grinder

1 Work Bench
2 Meat Blocks - Meat Tools
1 Walk-in Box
1 Allen Electric Adding Machine
2 Staplers
1 Billing Machine
1 File Cabinet
1 Room Scale
1 Truck (Chevrolet)
1 Stepladder
1 Stock Truck
3 Compressors
1 Number Rack
9 Wagons
16 Baskets

A G R E E M E N T

AGREEMENT MADE IN WASHINGTON, D. C. ON THE 9TH DAY OF AUGUST, 1961, BETWEEN MAYFAIR EXTENSION, INC., A MARYLAND CORPORATION, HEREINAFTER REFERRED TO AS THE 'LESSOR', FIRST PARTY, AND DAVID LUXENBERG HEREINAFTER REFERRED TO AS 'LESSEE', SECOND PARTY.

WHEREAS, UNDER DATE OF NOVEMBER 9, 1951 THE LESSOR ENTERED INTO AN AGREEMENT OF LEASE WITH DAVID LUXENBERG AND BARNEY MODER AS LESSEES, COVERING PREMISES 3026 HAYES STREET, N. E., WASHINGTON, D. C., BEING THE COMPLETELY EQUIPPED SUPER MARKET LOCATED IN SAID PREMISES, FOR A TERM OF FIVE YEARS FROM NOVEMBER 15, 1951, WITH AN OPTION FOR FIVE ADDITIONAL YEARS, COMMENCING ON NOVEMBER 15, 1956, WHICH OPTION WAS EXERCISED, AT A MONTHLY MINIMUM RENTAL OF ONE HUNDRED SEVENTY-FIVE ($175.00) DOLLARS WHICH IS BASED UPON A GROSS VALUE OF BUSINESS OF THREE THOUSAND ($3,000.00) DOLLARS PER WEEK, AND ADDITIONAL RENTAL ON ALL GROSS VOLUME OVER AND ABOVE THREE THOUSAND ($3,000.00) DOLLARS PER WEEK, COMPUTED AT THE RATE OF ONE AND ONE-HALF (1-1-2%) PER CENT OF SAID EXCESS OVER THREE THOUSAND ($3,000.00) DOLLARS IN GROSS BUSINESS PER WEEK; AND

WHEREAS, ALL OF THE RIGHT, TITLE AND INTEREST OF BARNEY MODER IN AND TO THE AFORESAID LEASE HAS HERETOFORE BEEN ASSIGNED TO LUXENBERG; AND

WHEREAS, THE SAID LESSOR UNDER DATE OF JANUARY 16, 1952 ASSIGNED UNTO THE RECONSTRUCTION FINANCE CORPORATION ALL OF ITS RIGHT, TITLE AND INTEREST IN AND TO THE RENTS ACCRUED UNDER THE AFORESAID LEASE; AND

WHEREAS, THERE IS ATTACHED TO THE AFORESAID LEASE OF NOVEMBER 9, 1951 A LIST OF THE FIXTURES AND EQUIPMENT WHICH ARE INCLUDED IN AND ARE A PART OF THE LEASED PREMISES; AND

WHEREAS, THE PARTIES HERETO DESIRE TO CONFIRM THEIR AGREEMENT AND UNDERSTANDING WITH RESPECT TO AN EXTENSION OF THE TERM OF THE AFORESAID LEASE AND WITH RESPECT TO CERTAIN OTHER AMENDMENTS THERETO AS HEREINAFTER SET FORTH,

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

(1) THE AFORESAID LEASE OF NOVEMBER 9, 1951 SHALL REMAIN IN FULL FORCE AND EFFECT UNDER ALL OF ITS TERMS AND CONDITIONS, EXCEPT AS HEREIN OTHERWISE PROVIDED, IN FAVOR OF THE HEREIN-NAMED LESSEE.

(2) THE TERM OF THE AFORESAID LEASE IS HEREBY EXTENDED FOR A PERIOD OF FIVE YEARS FROM NOVEMBER 15, 1961, WITH AN OPTION IN

FAVOR OF THE LESSEE FOR ONE RENEWAL OF SAID LEASE FOR A PERIOD OF FIVE (5) YEARS FROM NOVEMBER 15, 1956, UNDER THE SAME TERMS AND CONDITIONS OF SAID LEASE, AS AMENDED HEREBY PROVIDED THAT THE LESSEE SHALL NOTIFY THE LESSOR ON OR BEFORE SEPTEMBER 15, 1955, IN WRITING, OF ELECTION TO EXERCISE THIS OPTION.

(3) LEGAL TITLE TO ALL OF THE FIXTURES AND EQUIPMENT SET FORTH IN THE AFORESAID LEASE OF NOVEMBER 9, 1951 IS HEREBY VESTED IN THE LESSEE OUTRIGHT, FREE AND CLEAR OF ALL ENCUMBRANCES OF EVERY NATURE WHATSOEVER AS HIS SOLE AND ABSOLUTE PROPERTY, FOR AND IN CONSIDERATION OF THE PAYMENT TO THE LESSOR OF THE SUM OF ONE THOUSAND ($1,000.00) DOLLARS IN CASH, THE RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED BY THE LESSOR.

(4) NOTWITHSTANDING THE PROVISIONS OF THE AFORESAID LEASE TO THE CONTRARY, IT IS EXPRESSLY AGREED AND UNDERSTOOD THAT THE LESSEE SHALL HAVE THE RIGHT TO ASSIGN THE SAID LEASE, IN WHOLE OR IN PART, WITHOUT THE CONSENT OF THE LESSOR IN THE EVENT OF A SALE OR TRANSFER OF THE BUSINESS LOCATED IN THE LEASED PREMISES.

(5) IT IS HEREBY ACKNOWLEDGED THAT THE LESSEE HAS CURRENTLY MET ALL OF THE TERMS, CONDITIONS AND OBLIGATIONS OF THE AFORESAID LEASE, INCLUDING THE AMENDMENTS THERETO RESULTING FROM THE EXECUTION OF THIS AGREEMENT, ACCRUED UP TO THE DAY AND DATE OF THE EXECUTION HEREOF.

(6) THE TERMS AND CONDITIONS OF THE AFORESAID LEASE GRANTING TO THE LESSEES THEREIN NAMED THE FIRST OPTION TO LEASE THE SAID FOOD AND GROCERY FACILITIES WHICH MIGHT REPLACE THE EXISTING PREMISES AFTER THE POSSIBLE DEMOLITION THEREOF SHALL REMAIN IN FULL FORCE AND EFFECT IN FAVOR OF THE LESSEE EXCEPT ONLY THAT THE RATE OF RENTAL TO BE PAID IN SUCH CASE SHALL BE IN AN AMOUNT EQUAL TO AN BONA FIDE OFFER WHICH THE LESSOR MAY RECEIVE FROM ANOTHER PROSPECTIVE TENANT UNDER LIKE CONDITIONS AS THOSE IN FAVOR OF THE LESSEE, AND IN SUCH CHASE THE LESSEE SHALL HAVE THIRTY DAYS FROM THE DATE OF THE RECEIPT BY HIM OF NOTICE OF THE TERMS AND CONDITIONS OF SAID BONA FIDE OFFER WITHIN WHICH TO ELECT TO EXERCISE SAID OPTION TO LEASE THE SAID REPLACED FACILITIES.

(7) SIMULTANEOUS WITH THE EXECUTION OF THIS AGREEMENT, THE LESSEE SHALL BE FURNISHED WITH VALID WRITTEN EVIDENCE THAT THE RECONSTRUCTION FINANCE CORPORATION OR ITS LEGAL SUCCESSOR HAS APPROVED THE TERMS AND CONDITIONS OF THIS AGREEMENT IN ITS ENTIRETY, INCLUDING BUT NOT LIMITED TO APPROVAL OF THE CONVEYANCE OF TITLE TO SAID FIXTURES AND EQUIPMENT TO THE TENANT AND THE RIGHT OF THE TENANT TO PAY ALL SUMS DUE UNDER THE SAID LEASE AND UNDER THIS AGREEMENT TO THE LESSOR DIRECT, FREE AND CLEAR OF ALL OBLIGATIONS OF EVERY NATURE WHATSOEVER FROM THE TENANT TO THE RECONSTRUCTION FINANCE CORPORATION, OR ITS SUCCESSOR.

IN WITNESS WHEREOF, THE SAID MAYFAIR EXTENSIONS, INC. HAS ON THE DAY AND YEAR FIRST HEREINBEFORE WRITTEN CAUSED THESE PRESENTS TO BE SIGNED BY ITS _____, _____, ATTESTED BY ITS _____, _____, AND ITS CORPORATE SEAL TO BE HEREUNTO AFFIXED AND DOES HEREBY APPOINT THE SAID _____ ITS TRUE AND LAWFUL ATTORNEY IN FACT TO ACKNOWLEDGE AND DELIVER THESE PRESENTS AS ITS ACT AND DEED; AND DAVID LUXENBERG HAS ON THE DAY AND YEAR FIRST HEREINBEFORE WRITTEN AFFIXED HIS HAND AND SEAL HEREUNTO.

ATTEST:

_____
TITLE

(CORPORATE SEAL)

WITNESS:

_____

MAYFAIR EXTENSIONS, INC.

BY: _____
TITLE

_____

LEASE AS AMENDED AND EXTENDED

Between MAYFAIR EXTENSION, INC., Lessor, and DAVID LUMBERG and BARNEY ROSER, of Washington, D. C., Lessees.

RECEIVED FOR RECORD on the day of A. D. 19 at M and recorded in Liber No. folio et seq. one of the Land Records of the District of Columbia

Recorder

Premises 3926 Hayes Street, N. E., Washington, D. C., also known as Parcel 177/82 in the Northeast Section of Washington, D.C.

When recorded return to:

Warren E. Magee
ATTORNEY AT LAW
743 SHORSHAM BUILDING
WASHINGTON 5, D. C.
SUITE 308 RIDDELL BLDG.
1730 K ST., N. W.
WASHINGTON, D. C. 20006

BOOK PAGE
12278 538

REGISTERED MAIL
RETURN RECEIPT REQUESTED

April 19, 1963

L. S. Micheux, President
and
MAYFAIR EXTENSION, INC.,
1712 H. Street, N.E.,
Washington, D.C.

Gentlemen:

Reference is made to the Lease Agreement dated the 9th day of August, 1961, between MAYFAIR EXTENSION, INC. and DAVID LUXENBERG concerning premises 3926 Hayes Street, N.E., Washington, D.C.

Under the provisions of paragraph designated (2) of this Agreement, I, the lessee, am given a right of renewal of the lease term for a period of five (5) years from November 15, 1966 provided I give notice thereof in writing on or before September 15, 1966.

By this writing, I elect to exercise this option. I do hereby give notice thereof that I am renewing said Lease Agreement, under the same terms and conditions of said Lease, as amended, for a period of five (5) years from November 15, 1966.

Yours very truly,

David Luxenberg, Lessee

[This page left blank in order most efficiently to accommodate exhibit pages which follow]

Made the [illegible] day of [illegible] One Thousand Nine Hundred and Sixty Four

Between GOSPEL SPREADING ASSOCIATION INC., a District of Columbia corporation having an office at 905 16th Street Northwest, Washington, D. C.

hereinafter referred to as the "Landlord",

And THE GRAND UNION COMPANY, a Delaware corporation having an office at #100 Broadway, East Paterson, Bergen County, New Jersey

hereinafter referred to as the "Tenant",

Witnesseth, that the Landlord has demised and leased, and by these presents does hereby demise and lease to the Tenant, the premises (hereinafter more fully described) located in a shopping center to be constructed on the northwest side of Kenilworth Avenue between Hayes and Jay Streets, Northeast, Washington, District of Columbia

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Together with the appurtenances thereto and the use, in common with others, of the parking areas, roadways, means of ingress and egress and service areas shown on the annexed drawing, which use shall be for itself, its officers, employees, patrons and invitees, for the term of 15 years beginning on the 1st day of August, 1965, and ending on the 31st day of July, 1980, to be used for the sale of goods including without limitation, a use as supermarket for the preparation, storage, display and sale of groceries, meats, fish, delicatessen products, fruits, vegetables, bakery and dairy products, candy, tobacco products and beverages, and for the sale of such other goods and the rendition of such services as the Tenant may from time to time elect, upon the following terms, covenants and conditions, and each of the parties hereto hereby agrees to perform and observe the covenants and conditions herein contained on its part to be performed and observed.

1. The Tenant shall pay as rent, subject to the provisions of paragraph 47 hereof, the Tenant shall pay as rent the sum of TWENTY SIX THOUSAND ($26,000) DOLLARS per annum in equal monthly instalments of TWO THOUSAND ONE HUNDRED SIXTY SIX DOLLARS AND SIXTY SIX CENTS ($2,166.66)

each, in advance on the first day of each month during the term hereof, plus ONE and ONE QUARTER ($1\frac{1}{4}$) percent of the gross receipts from sales of merchandise effected by the Tenant at retail upon the demised premises which are in excess of TWO MILLION EIGHTY THOUSAND ($2,080,000.) DOLLARS in each lease year. Any percentage rent payable is to be paid within thirty (30) days after the close of each lease year and shall be accompanied by a verified statement of sales. For the purposes of this lease, the term "lease year" shall be deemed to mean each successive twelve month period beginning on August 1st. Percentage rent payable for any odd portion of a lease year at the beginning or end of a lease term shall be prorated on a per diem basis, computed on a 365 day year. The Landlord may inspect the Tenant's books for this store in order to verify such figures, provided such inspection is made during normal business hours at the office of the Tenant as aforesaid and provided further that such inspection be made within four months after the close of the lease year in question. Gross receipts shall not include sales, use, excise or other taxes imposed by governmental authorities on sales of merchandise.

2. The Landlord shall deliver actual possession of the premises to the Tenant ready for occupancy on the 1st day of July 1965 If such possession shall not be delivered on said date, no rent or other obligation of the Tenant hereunder shall begin to accrue until 30 days after such delivery. The date of expiration of this lease, specified above, shall not be postponed because of failure to deliver such possession on the date agreed; but, if the premises are not so delivered on or before the 1st day of December 1965 this lease may be terminated by the Tenant at any time before acceptance of possession. If this lease shall be so terminated by the Tenant, then, for a period of three (3) years after such termination, the Landlord shall neither use or permit the use of the premises or any part thereof or of the Shopping Center, as a food supermarket. The foregoing is subject to the provisions of paragraph 50 hereof

3. The Tenant shall make all necessary ~~incidental~~ repairs to the interior of the premises. The Landlord shall make all ~~other repairs, including~~ structural repairs, repairs to the exterior of the premises including the roof, skylights, sidewalks and parking areas, ~~replacement of door and window glass unless broken by Tenant's negligence, and repairs to and replacement of the electrical, plumbing, heating, air conditioning, sprinkler and hot water systems~~. The Landlord shall make any repairs necessary to keep the premises secure and free from water seepage. The Landlord shall also make any repairs or changes which may be necessary to make the premises and the use herein contemplated comply with applicable laws, ordinances, orders or regulations of any federal, state, county or municipal authorities now or hereafter in effect. If the Landlord shall fail, within a reasonable time after request therefor, to make such repairs or changes, or repairs necessitated by fire or other casualty, then (a) the Landlord shall be liable for any damages to property or other loss thereby sustained by the Tenant, and (b) the Tenant may have such repairs or changes made at the expense of the Landlord.

4. The Tenant may assign this lease or sublet the demised premises, or any part thereof, for the purpose herein permitted, or for any other lawful business which will not be extra hazardous on account of fire or conflict with any heretofore existing enforceable restrictions, without relieving the Tenant, however, from its obligations hereunder.

4 The Tenant agrees not to sell alcoholic beverages in the shopping center so long as all other tenants are similarly restricted.

5. The Tenant shall pay all charges for water, electricity and gas or oil supplied to its store building. Meters shall be installed by the Landlord to measure separately the Tenant's use of such utilities; all sewer charges are to be paid by the Landlord. See Continuation on Page 1 of Rider

6. The Tenant, whenever the weather shall require, shall heat the premises.

7. Throughout the term hereby granted and any extension thereof the Landlord shall, at Landlord's expense, maintain fire insurance with extended coverage endorsements on the demised premises and other structures in the Shopping Center, in solvent and responsible companies authorized to do business in the ~~State of~~ District of Columbia and equal to at least 80% of the insurable value of said premises (exclusive of land), and shall deliver certificates of said policies to the Tenant. If this lease shall continue after any damage to or destruction of the demised premises the Landlord shall hold the proceeds of any such insurance as a trust fund, to be applied first to the cost of repair or restoration of the premises. The Tenant shall not be liable for any damage to or destruction of the premises by fire or other casualty covered by the Landlord's said insurance, no matter how caused, it being understood that the Landlord will look solely to its insurer for reimbursement and not to Tenant. Any such insurance policy of the Landlord shall expressly waive any right of subrogation on the part of the insurer against the Tenant.

8. If during, or prior to the terms hereby granted, the premises shall be damaged or destroyed by fire or other casualty, the Landlord shall repair and restore the same at the Landlord's expense and as promptly as possible. If such damage or destruction: (a) shall be so extensive that the cost of repair or restoration would be in excess of 75% of the value of the demised store building (exclusive of land) when restored; and (b) shall occur at a time when the unexpired term of this lease shall be less than ~~10~~ 5 years, this lease shall terminate unless, within 30 days after such damage or destruction, the Tenant shall have elected to exercise one or more privileges of extension, given the Tenant by this paragraph or paragraph #15 hereof, and the aggregate of such unexpired and extended terms shall be at least ~~10~~ years. If at the time of the injury or destruction mentioned in subdivision (a), the aggregate unexpired and renewal terms shall be less than ~~ten~~ five years, the Tenant shall be privileged to extend the then current term for a period of ten years, as hereinafter mentioned. If the Tenant shall elect to take such ten-year extension, then: (1) the Landlord shall repair or restore the demised premises at the Landlord's expense and as promptly as possible; (2) the said ten-year extension shall begin 30 days after the Landlord shall have completed such repairs or restoration; and (3) the Tenant shall have no right of extension or renewal other than said ten-year extension. In the event of termination under this paragraph, all rent shall be adjusted and apportioned at the time of such destruction; otherwise, the rent shall be abated in an amount corresponding with the time during which and the extent to which the premises have been untenantable.

9 The Landlord may enter the demised premises during all reasonable business hours, to inspect the same or to exhibit the premises to prospective purchasers.

10. During the term of this lease and any extension thereof the Landlord shall not use nor permit to be used any other part of the shopping center or any other property directly or indirectly owned or controlled by the Landlord within a radius of five thousand feet of the shopping center for the sale of food for consumption off premises. If this covenant be violated, the Tenant, without liability of forfeiture of its term, may withhold payment of any or all instalments of rent accruing during such violation. The total amount of such rents thus withheld shall be deemed to be liquidated damages for such breach of covenant and not as a penalty therefor. In addition to this remedy the Tenant shall be entitled to injunctive or other appropriate relief upon a breach of this covenant.

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11. The Landlord covenants and warrants that the premises may be used for the purposes herein contemplated throughout the term of this lease and any extension thereof. ~~During such periods the Landlord shall not use or permit any part of the shopping center to be used in such manner as to cause annoying noises or vibrations, or offensive odors.~~ **

12. The Landlord covenants and warrants it has full right and lawful authority to enter into this lease for the full term herein granted and for all extensions herein provided, and that it has a good and marketable title to the premises, free and clear of all occupancies, tenancies, mortgages, liens and other encumbrances except the following: None.

an opinion of council

Within sixty days after the date hereof the Landlord shall deliver to the Tenant ~~a title insurance policy~~ evidencing the state of Landlord's title as of a date not earlier than the date hereof and an opinion of counsel regarding the state of such title shall be delivered to the Tenant sixty days prior to acceptance of possession by the Tenant.

13. The Tenant shall quietly enjoy the premises for the full term herein granted and for all extensions herein provided for.

14. This lease shall be subject and subordinate to the lien of any first mortgage on the demised land and building, or upon the entire Shopping Center, but only if such mortgage shall provide: (a) that the holder thereof shall not be entitled to terminate this lease, or any extension thereof, by foreclosure or other means, provided the Tenant or its successors or assigns shall not be in default hereunder beyond any period herein given the Tenant to cure such default, and (b) that the lien of such mortgage shall not cover any of Tenant's fixtures, alterations or improvements which, by law or the terms of this lease, Tenant is permitted to remove from the demised premises.

15. The Tenant, at its option, shall be entitled to 3 successive extensions of this lease to be exercised separately, each such extension to be for a period of 5 years and to be upon the same terms, covenants and conditions as those of this lease, ~~except that during such extension periods the rental shall be diminished so as to be as follows:~~

~~** In the event the Tenant shall be unable to use the premises for the purposes herein contemplated for any period of time in excess of 48 hours or if in any 12 month period the Tenant shall be deprived of the use of the premises for any periods of time aggregated to more than 72 hours (other than by reason of fire or other casualty as set forth in paragraph 8 hereof) it shall be entitled to cancel and terminate this lease by notice to the landlords~~

lease at its expiration or at the expiration of any extension period herein referred to, except the last extension period, it shall be considered as having elected to avail itself of said option from term to term, without further notice to the Landlord.

Furthermore, the Tenant may, at any time during its tenancy hereunder, elect to exercise this option as to any one or more of such extensions by giving notice of such election to the Landlord.

16. The Tenant may from time to time at its expense paint and decorate the premises and make such changes, alterations, additions and improvements as will, in the judgment of the Tenant, better adapt the same for the purpose of its business. The alterations and additions shall be of such a character as not to adversely affect the value or decrease the cubical contents of the building.

17. On the termination of the Tenant's occupancy the premises shall be surrendered in the condition in which the Tenant is required to maintain same, reasonable wear and tear and damage by fire and other action by the elements, excepted. In the event that the Tenant shall for any reason remain in possession after the expiration of either the term hereby granted or any renewal or extension thereof (except pursuant to such renewal or extension), or after the date specified in any notice of termination given by either the Landlord or Tenant, such possession shall be as a month to month tenant during which time the Tenant's liability shall be limited to payment of a monthly rent the same as that provided for during the last month of the preceding term.

18. The Tenant shall have the privilege, at any time on or before vacating the premises, of removing any or all of its personal property, equipment and fixtures, and shall repair any damage thereby caused.

19. If any rent shall become due and unpaid, the Landlord may give the Tenant notice thereof and only if the Tenant shall fail to remedy such default within twenty days after receipt of such notice shall it be lawful for the Landlord to maintain proceedings for the recovery of possession of the premises.

20. If the ownership of the premises or the name or address of the party entitled to rent hereunder shall be changed, the Tenant may until receipt of proper notice of such change continue to pay the rent accrued and to accrue hereunder to the party to whom and in the manner in which the last preceding instalment of rent was paid; and each such payment shall to the extent thereof exonerate and discharge the Tenant. Any notice given under this Paragraph 20 shall bear the signature of the Landlord to whom the last preceding instalment of rent was paid provided that if such party shall be deceased or incompetent the signature may be that of the duly appointed personal representative of such party.

21. If the Landlord shall fail to pay ~~within ten days after due~~, the principal, interest, or instalment of either, on any mortgage paramount to this lease, or any instalment of taxes or assessments affecting the premises, or shall fail promptly to remove any other lien or charge, ~~which could jeopardize~~ the Tenant's right to possession as hereby granted, the Tenant may pay the item in question. Any such payment shall entitle the Tenant to be subrogated to the lien or charge of the item so paid in addition to the rights given the Tenant under paragraph 22 hereof.

and is thereby jeopardized

If the Landlord shall fail to carry out any obligation on the Landlord's part in this lease contained, the Tenant may, after reasonable notice or without notice ~~if in the Tenant's judgment~~ an emergency shall exist, perform such obligation at the expense of the Landlord.

22. If the Tenant shall make any payment or advance at the expense or for the account of the Landlord, pursuant to any provisions of this lease, the Tenant shall be entitled to reimbursement thereof from the Landlord. The Tenant may apply such claim against any subsequent instalment of rent and, if not reimbursed

at the expiration of the term hereby granted or any extensions thereof, may remain in possession of the premises until completely reimbursed.

23. Any notice or demand, which, under the terms of this lease or by any statute or ordinance, must or may be given or made by a party hereto, shall be in writing and may be given by ordinary or certified mail sent to the aforementioned address of the other party in question or to such other address as such party may from time to time designate by notice. No such notice or demand shall affect the Tenant unless it or a copy thereof shall be given personally at or sent by certified mail to its principal office.

24. The Landlord shall begin, as promptly as possible, the construction, alterations and repairs provided for and indicated on the annexed drawing and the Building Lease Specifications (consisting of sheets) both of which have been initialed by the parties, attached hereto and made a part hereof, and furthermore the Landlord shall complete all such work in a neat and workmanlike manner, (free of all claims and encumbrances except those mentioned in paragraphs #12 and #14 hereof) and in compliance with said specifications. The Tenant shall not be deemed to have received actual possession of the premises ready for occupancy within the meaning of Paragraph #2 hereof, until all such work has been completed as herein provided. The Landlord shall carry out all such work in accordance with the requirements, orders and limitations of all local, state or federal departments or bureaus having jurisdiction therein, and in such manner that the premises when completed shall be in compliance with all governmental requirements for the use which the Tenant may make of them. All permits and licenses and necessary insurance required in connection with the above work are to be obtained and paid for by the Landlord.

substantially

the term "substantially completed" shall mean that point in the course of construction where the cost of completion will be less than $1000

The approval by the Tenant of any plans and specifications herein referred to, or any suggestions with respect thereto, shall not constitute an opinion or representation with respect to the sufficiency thereof or impose any present or future liability or responsibility upon the Tenant.

25. The Tenant may, upon obtaining any necessary permits from governmental authorities, erect and maintain at its own expense, from the date of execution hereof throughout the term of this lease signs of such dimensions and materials as it may desire. Such signs shall be removed by the Tenant upon the termination of its occupancy in the demised premises.

26. If the demised premises shall be tendered to the Tenant, ready for occupancy within the meaning of Paragraph #2 hereof prior to the 1st day of July, 1965, the Tenant shall accept possession and shall pay the rent herein provided, beginning on the day after such acceptance of possession. The provisions of this Paragraph #26 shall not affect the expiration of this lease or any extension hereof.

27. The Tenant shall be entitled to enter upon the demised premises during the course of the Landlord's construction, alterations and repairs, for the purpose of inspection, making measurements and doing whatever may be appropriate to prepare the premises for Tenant's occupation, provided such entry shall not substantially interfere with Landlord's construction, alterations or repairs. No such entry shall be deemed an acceptance of possession or waiver of any rights of the Tenant in event of a failure on the part of the Landlord to deliver possession at the time and in the condition herein required.

28. The Shopping Center shall be comprised of buildings not higher than one story above street level and such buildings may be occupied for the purpose of retail sales and services only, except that it is agreed that a bank or

29. The provisions of this Paragraph #29 shall apply to the Shopping Center and the Landlord will (a) include in each lease of any part of the Shopping Center terms appropriate to carry out such provisions; and (b) will enforce compliance with the same.

A. Except as provided in the specifications hereto annexed, there shall be no free standing tower and loan institution may

B. No signs shall extend above the parapet heights of the buildings or shall project more than 18 inches from the front building line. Any Tenant whose store has a canopy may erect signs thereon provided such signs do not extend beyond the edge of the canopy nor above the parapet height of the building.

be a Tenant in the shopping center.

C. No sidewalks, parking areas, roadways, means of ingress or egress or other common areas, shall be used for the sale, display or storage of merchandise or any other property of any tenant. All business shall be conducted within the store buildings.

D. All tenants and their employees shall be restricted to parking in the area designated ~~"Employee Parking" on the annexed drawing.~~ by mutual agreement of the Landlord and Tenant,

30. The Landlord shall at all times keep the parking and service areas clean and free of snow, ice and debris; shall illuminate the same by means of flood lights during each business day from sunset to ten ~~xxxx~~ minutes after Tenant's store closes; shall supervise said parking and service areas; and shall mark and reline said areas as often as may be necessary.

31. Wherever in this lease any printed portion, or part thereof, has been stricken out, whether or not any relative provision has been added, this lease shall be read and construed as if the material so stricken out were never included herein and no implication shall be drawn from the text of the material so stricken out, which would be inconsistent in any way with the construction or interpretation which would be appropriate if such material were never contained herein.

32. Words of any gender used in this lease shall be held to include any other gender, and words in the singular number shall be held to include the plural, when the sense of the words requires the same.

33. Breach of any covenant of this lease, except a covenant to pay rent, shall not entitle the Landlord to a forfeiture of the term hereof. The Tenant agrees that it will not cancel this lease for any rea[son] other t[han] those s[pec]ifically enumera[ted] herein Except A Breach Landlord warranty contained Paragraph and 1A h[ereof] shall not [entitle] Tenant t[o] ... cancell...

34. This lease may not be modified except by an instrument in writing signed by the parties hereto, their heirs, legal representatives, successors or assigns.

35. The covenants and agreements contained in this lease shall inure to the benefit of and be binding on the parties hereto, their heirs, legal representatives, successors, or assigns.

36. If the Landlord shall consist of two or more parties or a partnership or other entity other than a corporation, the liability of each of such parties hereunder, including the members of any such partnership, shall be joint and several.

37. The term "shopping center" as used herein shall mean the lands outlined in blue on the annexed drawing together with all improvements now or hereafter thereon.

Continued on rider annexed hereto consisting of pages and hereby made a part of this lease.

In Witness Whereof the parties hereto have executed this lease, the day and year first above written.

GOSPEL SPREADING ASSOCIATION INC.

[signature] Secretary

(Landlord) By [signature] Pres. L.S.

ATTEST:

_____ Assistant Secretary

THE GRAND UNION COMPANY

(Tenant) By _____ L.S.
Vice-President

STATE OF

COUNTY OF
DISTRICT OF COLUMBIA } ss:

I, LAURA J. RITENOUR, a Notary Public in and for the District of Columbia do hereby certify that L. S. McMURRAY, who is attorney-in-fact for GOSPEL SPREADING ASSOCIATION INC., the corporate Landlord in the foregoing and attached lease bearing date of the 14 day of MAY, 1964, personally appeared before me in said District, the said L. S. McMURRAY being personally well known to me as the person named as attorney-in-fact in said lease for the said GOSPEL SPREADING ASSOCIATION INC., and acknowledged said lease to be the act and deed of the said corporation and that he delivered the same as such.

GIVEN UNDER MY HAND AND SEAL THIS 14 day of MAY, 1964.

My commission expires: June 14 1964

(Notary Public)

STATE OF NEW JERSEY

COUNTY OF BERGEN

I, _____, a Notary Public in and for the STATE OF NEWJERSEY do hereby certify that _____, who is attorney-in-fact for THE GRAND UNION COMPANY, the corporate Tenant in the foregoing and attached lease bearing date of the ___ day of _____, 1964, personally appeared before me in said State, the said _____, being personally well known to me as the person named as attorney-in-fact in said lease for the said THE GRAND UNION COMPANY, and acknowledged said lease to be the act and deed of the said corporation and that he delivered the same as such.

GIVEN under my hand and seal, this ___ day of _____, 1964.

My commission expires: _____

(Notary Public)

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4. (cont'd.) In the event the above named Tenant assigns this lease or sublets the demised premises, or any part thereof, during the initial term of this lease, the liability of the above-named Tenant shall not, in any event, apply to any obligation or liability accruing after the expiration of the initial term of this lease or in the event of an assignment or subletting during a renewal term, the liability of the above-named Tenant shall not, or any event, apply to any obligation or liability accuring after the expiration of such renewal term; ~~It is agreed however that in the event the Tenant's liability shall cease by operation of the foregoing, the Landlord may cancel this lease as of the date the Tenant's liability ceases in accordance herewith.~~

5. (cont'd.) The Tenant agrees to pay all sewer charges based upon the quantity of the Tenant's water usage where such charges are incorporated as part of the water bills. However, the Tenant shall not be liable for any sewer assessments, nor any sewer charges, including those charges mentioned in the preceding sentence where such charges are made in lieu of sewer assessment.

38. Simultaneously with the Tenant's store, the Landlord shall construct 150 lineal front feet of other single story retail stores upon the area designated "other stores" on the annexed drawing. The Tenant's store shall not be deemed to have been delivered within the meaning of paragraph 2 hereof unless and until the "other stores" called for herein shall have been completed. All such other stores shall be contiguous with the Tenant's store.

39. The Landlord shall insert a clause in the leases of all other tenants restricting the parking of such tenants and their employees to an area to be designated by mutual agreement of the Landlord and the Tenant herein. The Tenant herein agrees that in such event the parking of its employees will likewise be restricted.

40. The Tenant may design and have reserved for it a parcel pick-up area along the entire front or side of the demised building, adjacent to the sidewalk abutting same; such parcel pick-up area is

comprised of a strip of land not less than ten (10) feet in width which has been graded and paved in the same manner as the parking area. The outer edge of the parcel pick-up area shall be delineated by a white line running parallel to and not less than ten (10) feet from the sidewalk and the words "No Parking—Parcel Pick-Up Area" shall be painted in white in said area. The parcel pick-up area shall not be a part of the roadway through the parking lot and shall be provided and maintained by the Landlord.

41. The Tenant shall be responsible for the replacement of plate glass in its store building unless the damage thereto is attributable to causes covered by the Landlord's fire insurance policy with extended coverage or where such replacement is necessitated by settling of the building. In such latter events, the replacement of plate glass shall be the responsibility of the Landlord.

42. It is hereby agreed that no free standing tower shall exist in this shopping center during the period of the Tenant's lease or any renewals thereof; except that the Landlord may erect a free standing tower bearing the name of this shopping center, and the Tenant, at its sole cost and expense, may erect a free standing tower advertising its name and business upon the lands comprising the demised premises at any time prior to or during the term of this lease and any extensions or renewals thereof.

43. The Landlord shall commence construction of the Tenant's store on or before January 1st, 1965, and if Landlord shall fail to commence construction by said date Tenant may cancel this lease at any time thereafter before such construction shall be commenced. This right of cancellation shall not be deemed waived by an continuance of such work or on behalf of the Landlord whether or not the same is with the Tenant's knowledge, nor by any act of the Tenant or any representative of the Tenant, nor otherwise than by writing to such effect, signed by the Tenant. Construction shall be deemed to have commenced after

the footings and foundations shall have been substantially completed. Upon a termination of this, pursuant to this paragraph, neither party shall be under any liability to the other party except that the rights of the Tenant under paragraph 2 hereof shall survive such termination.

44. The Landlord agrees that if the Tenant shall cause this lease or a memorandum thereof to be placed upon the public record, the Landlord will reimburse the Tenant for the cost of such recording.

45. In the event of a breach of the Tenant's covenant to pay rent, the Landlord may, if the same is not remedied within 20 days after notice to the Tenant of such breach, re-enter the demised premises and remove all persons and all or any property therefrom, either by summary dispossess proceedings or by an suitable action or proceeding at law, and enjoy the said premises together with all additions, alterations and improvements. In the event of the termination of this lease by summary dispossess proceedings or upon the Landlord recovering possession of the demised premises in a manner or in any of the circumstances herein mentioned by reason of or based upon or arising out of such default on the part of the Tenant, the Landlord, may at its option, at any time and from time to time relet the demised premises or any part or parts thereof and receive and collect the rents thereof applying the same, first to the payment of such expenses as Landlord may have incurred in recovering possession of the demised premises including legal expenses and attorneys' fees and expenses, brokers' commissions and charges paid, assumed or incurred by the Landlord in and about the reletting of the premises and then to the fulfillment of the covenants of the Tenant hereunder. Any such reletting herein provided for may be for the remainder of the term of this lease or have a longer or shorter period. In any such cases and whether or not the demised premises or any part thereof be relet, the Tenant shall pay to the Landlord the rent and all other charges required to be paid by the Tenant up to the time of such termination of this lease or of such

recovery of possession of the demised premises by the Landlord as the case may be, and thereafter the Tenant covenants and agrees if required by the Landlord, to pay to the Landlord until the end of the term of this lease the equivalent of the amount of all the rent reserved herein and all other charges required to be paid by the Tenant, less the net avails of reletting, if any, and the same shall be due and payable by the Tenant to the Landlord on the several rent days specified herein; that is to say, upon each of such rent days, the Tenant shall pay to the Landlord the amount of the deficiency then existing.

In the event of a breach of any covenant of this lease, other than a covenant to pay rent, the Landlord shall be entitled to the remedies provided for in this paragraph only after (a) notice from the Landlord to the Tenant of such breach and (b) the Tenant has failed to remedy such default; however, the Tenant, providing its proceeds in good faith, shall have as much time as may be necessary to remedy any such default.

The Tenant may, after reasonable notice, or without notice, if an emergency shall exist, perform any obligation of the Landlord hereunder, which the Landlord shall fail to perform, for the account of the Landlord; in such event the Tenant shall be entitled to reimbursement therefor from the Landlord and the Tenant may apply such claim against any subsequent installment(s) of rent. In the event the claim so applied shall be determined to be invalid, the Tenant shall promptly pay over to the Landlord the amount so withheld, together with interest thereon computed at the rate of six percent (6%) per annum and the amount of any reasonable expense incurred by the Landlord in obtaining judicial determination of the invalidity of such claim, but, notwithstanding the invalidation of such claim, such application shall not be deemed a violation of the Tenant's covenant to pay rent.

46. The premises demised under this lease include a new one story store building with 4,000 square foot mezzanine to be constructed by the Landlord for the sole use of the Tenant at the location outlined in red on the annexed drawing. The Tenant's store shall have a frontage o

of 140 feet facing Kennelworth Avenue by a uniform depth of 100 feet comprising a first floor area of 14,000 square feet. Also demised is the use of the shopping center land outlined in blue on the annexed drawing; said land has a frontage on the northwesterly side of Kennelworth Avenue extending between Hayes Street and Jay Street, Northeast, the distances of which frontage the Landlord represents to be a minimum of 600 feet, and a depth of 212 feet with resultant frontages of 212 feet on the easterly side of Hayes Street and the westerly side of Jay Street. Such use shall be for the Tenants, its customers, employees and invitees, in common with other tenants of the shopping center, their customers, employees and invitees. The Landlord shall prior to delivery of the demised premises to the Tenant. improve the demised land in accordance with the annexed drawing and shall grade and pave all of the same except that portion thereof upon which the buildings are to be erected. The development of such shopping center shall not deviate from that shown on the annexed drawing and the same shall be maintained throughout the term of this lease and any extensions and renewals thereof.

47. The Tenant shall, during the fourth and subsequent years of this lease reimburse the Landlord for a portion of the amount by which annual Real Estate taxes assessed against the shopping center in the fourth and subsequent years of the Tenant's occupancy of the premises exceed the amount of such taxes during the third full year of the Tenant's occupancy. For the purpose of determining the Tenant's share of such tax increase, the amount of same shall be multiplied by a fraction the numerator of which shall be the number of square feet of first floor area occupied by the Tenant in the shopping center and the denominator of which shall be the total number of square feet of building area in the shopping center. If the tax assessment in the third year of the Tenant's occupancy is not based on the full assessed value of the land and buildings then existing the Tenant's obligation shall be based on the increase

in taxes over the amount of same during the first year in which the same are in fact fully assessed. The Tenant's obligation under this paragraph shall arise but once each year upon submission by the Landlord to the Tenant of a statement showing the computation upon which the Tenant's liability, if any, is based, together with photostats of applicable tax bills. The Tenant shall in no event be responsible for any special or betterment assessment, its obligation hereunder being based solely upon Real Estate taxes on the shopping center.

Any payment hereunder shall be deductible from percentage rent next payable if any; however, the Tenant's right to deduct from percentage rent shall not accrue from year to year.

~~48. The Tenant's rental obligation set forth in paragraph 1 thereof is based upon the Landlord's representation that prior to delivery of the demised premises the apartment development known as the Mayfair Apartments lying adjacent to the shopping center will include 500 units in addition to those presently existing therein. In the event less than 500 additional units have been constructed at the time the premises are delivered to the Tenant the rental payable hereunder shall until completion of the entire 500 additional units in said apartment development shall be the sum of TWENTY ONE THOUSAND ($21,000) DOLLARS per annum, payable in equal monthly installments of ONE THOUSAND SEV~~ SEVEN HUNDRED ~~FIFTY ($1,750) DOLLARS each, in advance of the first day of each month, plus ONE AND ONE~~ QUARTER ~~(1 1/4) PER CENT of the gross receipts from sales of merchandise effected by the Tenant at retail upon the demised premises which are in excess of ONE MILLION EIGHT HUNDRED THOUSAND ($1,800,000) DOLLARS in each lease year.~~

49. Rentals payable hereunder shall until further notice from the Landlord, its successors or assigns be paid to Walker and Dunlop, Agents, 905 16th Street Northwest, Washington, D. C. The Tenant has been informed that the Landlord has entered into an agreement with said

Walker and Dunlop whereunder the Landlord is to pay leasing commissions on a monthly basis. The Landlord warrants that no other broker brought about or is in any way entitled to commissions, fee, or other payment on account of or arising out of this transaction.

50. The Tenant agrees that it will provide the Landlord with 60 days advance written notice of any cancellation of this lease pursuant to the provisions of paragraph 2 hereof, and further agrees that if on the first day of December, 1965 the premises are substantially under construction, it will defer exercise of its right of cancellation so long as such construction is continued with diligence and continuity. It is further agreed that if after receipt of Tenant's aforementioned 60 day notice of termination and prior to the effective date thereof, the Landlord shall evidence to the Tenant that the Landlord has entered or is about to enter into a bona fide contract for the construction of the Tenant's building and other improvements called for herein, the Tenant shall by notice to the Landlord either defer the effective date of such termination for a period of twelve months, providing that during such period the Landlord diligently and continuously proceeds to carry out such construction, or reimburse the Landlord for such costs incurred by it in connection with this lease as it may evidence to the Tenant at the time it evidences such contract or the imminence thereof.

48. The tenant presently considers the addition of at least 500 units to the Apartment Development known as Mayfair Mansion Apartments lying adjacent to the Shopping Center essential to it's profitable business operation in the demised premises. It is therefore agreed that unless the Landlord shall on or prior to September 1, 1964, guarantee in writing to the Tenant that it will include an additional 500 units in said Apartment Development prior to the delivery of the demised premises to the Tenant, the Tenant may cancel this lease at any time thereafter prior to October 1, 1964. Such cancellation shall be without further liability of either party to the other hereunder. In the event the Land-

lord guarantees the construction of such additional units as herein provided, and fails to complete the same within 6 months after delivery of the demised premises to the tenant herein, then commencing with the ~~seventh~~ month after such delivery and continuing until such apartment units are in fact completed. The rental payable hereunder shall be reduced so as to the sum of TWENTY ONE THOUSAND ($21,000) DOLLARS per annum, payable in equal monthly installments of ONE THOUSAND SEVEN HUNDRED FIFTY ($1,750) DOLLARS each, in advance on the first day of each month, plus ONE AND ONE QUARTER (1-1/4%) PERCENT of the gross receipts from sales of merchandise effected by the Tenant at retail upon the demised premises which are in excess of ONE MILLION EIGHT HUNDRED THOUSAND ($1,800,000) DOLLARS in each lease year.

PEED AND WISE
Attorneys at Law
1707 H Street, N. W.
Washington, 6, D. C.

ROGER PEED
JOEL C. WISE

September 30, 1963

Mr. David Luxenberg and
Mr. Barney Moder
3926 Hayes Street, N. E.
Washington, D. C.

Re: Lease on Gocery Store

Gentlemen:

We represent Mayfair Extension, Incorporated, the lessor of the premises you now occupy.

As you know the District of Columbia is demanding that the shopping center be demolished. The lessor may get an order to raze the building any day and are, therefore, making plans to erect new facilities.

The lessor proposes to erect a new food store with 14,000 square feet of space. In order to build the new food store the cost will be $190,000.00. To justify this loan the annual rent must be no less than $27,000.00 per year. Attached is a breakdown prepared by the agents of the owner for your review.

Before the owner can proceed to arrange the financing we must have a firm lease on the building at an annual rental of $27,000.00 per year.

Please advise, within ten days, whether or not you elect to lease the new food store at the aforementioned rental.

Very truly yours,
/s/ Joel C. Wise
PEED & WISE

cc: Mayfair Extension, Incorporated
Elder Michaux

SALES AGREEMENT

This Agreement made and entered into in the city of Washington, District of Columbia on this 27th day of December, 1961.

SELLER: David Luxenberg and Sayde Luxenberg

BUYERS: Leon Beck and Ethel Beck.

BUSINESS SOLD: Mayfair Super Market, Located at No. 3926 Hayes Street, N. E., Washington, D. C.

PRICE: Twenty-one Thousand ($21,000.00) Dollars, plus dollar for dollar value of all saleable stock in trade.

TERMS: The sum of Fifteen Thousand ($15,000.00) Dollars to be paid in cash and the balance to be secured by a chattel deed of trust payable at the rate of $250.00 per month, including interest at rate of 6% per annum, with privilege of making larger payments in any amount. A deposit of One Thousand ($1,000.00) Dollars paid herewith is to be held by Jacob Sandler Attorney until date of settlement, and which sum shall represent part of the cash payment.

CONDITIONS: This sale subject to:

(A)

Transfer of existing lease which runs for a period of five years from November 15, 1961 with an option for an additional period of five years from November 15, 1966 at a minimum monthly rental of One Hundred Seventy Five ($175.00) Dollars based upon a gross value of business of Three Thousand ($3,000.00) Dollars per week and an additional rental on all gross volume over and above Three Thousand ($3,000.00) Dollars per week computed at the rate of One and One-half (1-1/2%) per cent of said excess over Three Thousand ($3,000.00) Dollars in Gross business per week.

(B)

Transfer of all licenses and permits, including but not limited to grocery, occupancy permit, patent medicine, cigarette license, etc. In the event that the D. C. Government shall require certain repairs

or alterations to be made for the transfer of said licenses and/or permits it is agreed that the Sellers agree to pay for such repairs and/or alterations up to the sum of Three Hundred ($300.00) Dollars. In the event such alterations or repairs shall exceed the sum of Three Hundred ($300.00) Dollars the sellers and the Buyers shall have the right to split said alterations and/or repairs costs in excess of Three Hundred ($300.00) Dollars, or they shall have the option not to make such repairs and/or alterations and to cancel this Agreement without any adjustments whatsoever, except the refund to the Buyers of the aforesaid deposit.

ADJUSTMENTS: All adjustments, including but not limited to personal property taxes, salaries and other charges, shall be adjusted to the date of settlement.

BROKER: There is no broker in this transaction.

GUARANTEE: Commencing Monday, January 8, 1962 for a period of two weeks thereafter the Sellers guarantee to the Buyers that the gross sales shall amount to not less than Five Thousand ($5,000.00) Dollars per week. When the Guarantee has been met, inventory of all saleable merchandise shall be taken, the cost of same to be borne equally by Buyers and Sellers. The said business is open six and one-half days per week and the guarantee herein referred to shall cover the said six and one-half day weeks' period.

CONDITIONAL POSSESSION: When the Guarantee has been met the Buyers shall be entitled to conditional possession of said business without compensation to either the Sellers or the Buyers. All funds are to be handled by the Sellers. Buyers and Sellers shall initial for each other a daily record of income and disbursements accruing from and after the guarantee period. The excess income accruing over expenditures during said period of conditional possession, after guarantee, shall be paid to the Buyers in cash if this transaction is fully settled; otherwise, said funds shall be retained by Sellers, it being understood

no salaries shall be paid to Buyers or Sellers during period of conditional possession.

SETTLEMENT: Settlement is to be made when the guarantee has been met and all licenses and permits and lease have been delivered to Buyers. At time that the assets are to be conveyed from Sellers to Buyers, they shall be conveyed free and clear of all debts and encumbrances under the D. C. Bulk Sales Law; Bill of Sale to contain broad restrictive covenant prohibiting David and/or Sayde Luxenberg from engaging, directly or indirectly, as employer, employee or in any other manner, in the retail grocery business within a radius of ten city blocks for a period of five years from date of settlement.

MUTUAL FORFEITURE: The Parties hereto being desirous of avoiding Litigation in case of a breach of this contract and damages resulting therefrom not now known it is agreed that in case of a breach hereof, the defaulting party will pay to the other party as liquidated damages and not as a penalty the sum of One Thousand ($1,000.00) Dollars, and the parties shall thereupon be released from the operation of this contract.

Jacob Sandler is acting as attorney for the Buyers and the Sellers by their mutual request and consent.

In the event that the aforesaid premises herein referred to shall be demolished by the Landlord and replaced by a new building, and the Buyers shall not Agree to pay the Landlord the rate of rental for the said new premises to be fixed by a bona fide offer which the Lessor may receive from another prospective tenant under like terms and conditions as those in favor of this Lessee, the Buyers shall have the option to cancel the existing balance on the said chattel deed of trust note due the Sellers. However, if the Buyers shall exercise the said option to cancel the note due to the Sellers it is agreed that the Buyers shall give the Sellers the right to exercise any option from Lessor to occupy the new premises to be constructed by Lessor. In such event the Sellers

shall pay to the Buyers dollar for dollar for all saleable merchandise remaining in said premises.

The Sellers shall furnish within five days a list of all fixtures and equipment connected with said business located in said premises.

This Agreement shall be binding upon the parties hereto and their respective heirs, executors and administrators and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their hands and seals on the day and year first hereinbefore written.

WITNESSES:

/s/ David Luxenberg
/s/ Sayde Luxenberg
/s/ Leon Beck
/s/ Ethel Beck

[2] STANLEY H. FREED

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MAGEE:

Q. Please state your full name and address. A. Stanley H. Freed, F-r-e-e-d.

Q. Where do you reside? A. 222 Congressional Lane, Rockville, Maryland.

Q. First, are you employed presently by Grand Union, sir? A. Yes, sir.

Q. Would you just tell the Court briefly what Grand Union is? A. It is a Supermarket chain operating supermarkets throughout the eastern part of the United States, that is Grand Union.

[3] Q. And would you give the Court some conception as to the size? Would you have any idea as to how many stores are operated? A. Approximately five hundred stores, gross sales of approximately 740-some odd million dollars in a fiscal year just past.

Q. Now, Mr. Freed, a subpoena was served on Grand Union for the production of certain documents which you have in your possession; is that correct? A. Correct.

Q. Now pursuant to that subpoena have you produced a lease agreement executed between Grand Union and Mayfair Extension, Inc.? A. I have a lease agreement.

Q. Would you give us the date of it, sir? A. Dated 14 May 1964.

MR. MAGEE: I would like to have this lease agreement marked as Defendant Luxemberg's Exhibit number 1 for identification.

THE COURT: It will be so identified.

(Defendant Luxemberg Exhibit 1 marked for identification.)

BY MR. MAGEE:

Q. I show you, Mr. Freed, what has been marked [4] Defendant Luxemberg's exhibit number one for identification, your lease dated May 4, 1964. First, is this an executed lease? A. I am not an attorney, but it appears to me to be executed.

THE COURT: Wait just a moment. Let's get Mr. Freed's background on it. Did he draw it?

MR. MAGEE: No, sir.

THE WITNESS: No.

BY MR. MAGEE:

Q. We will turn to the back of the lease, Gospel Spreading Association, Inc., by L. S. Michaux, President, signed by Grand Union Company, by your Vice President: is that correct? A. Yes, sir.

Q. Now briefly, can you tell the Court where you can find it, where you can find the amount of square footage that would be involved in this lease? A. Yes, sir.

MR. WISE: May it please the Court, I would like to interpose an objection at this time about this lease. It is apparently a lease between Gospel Spreading Association and Grand Union and has no bearing on this case at all.

THE COURT: Well, a better objection is that the lease speaks for [5] itself.

MR. WISE: Yes.

MR. MAGEE: We will get to that point, Your Honor.

THE COURT: All right.

THE WITNESS: There is a plat plan attached to the lease.

BY MR. MAGEE:

Q. And just for the information of the Court what is the square footage involved in this lease? A. The Grand Union, the proposed Grand Union Store is 140 feet by 100 feet. Fourteen thousand square feet.

Q. Now where is this property located that is the subject matter of this lease? A. It is located on Kenilworth Avenue and Hayes Street.

Q. In the City of Washington, District of Columbia? A. That is correct, on the vacant piece of property to the rear, I believe, of the existing store.

Q. Now just before you leave the stand I think we should clarify one thing. There is a provision here marked Paragraph 43 of the lease, which has a provision in it in regard to cancellation; is that correct? A. I have to say it appears to. I am not the [6] Company's attorney. I am the company's real estate manager for this division.

Q. So there won't be any misunderstanding, —

MR. MAGEE: Mr. Wise, you have a copy of the lease.

> The first paragraph reads, of 43: 'The Landlord shall commence construction of the tenant store on or before January 1st, 1965, and if the Landlord shall fail to commence construction by said date tenant may cancel this lease at any time thereafter before such construction shall be commenced."
>
> BY MR. MAGEE:

Q. Now I ask you specifically, has Grand Union ever cancelled this lease pursuant to that provision? A. Not to my knowledge. Not to my knowledge.

Q. Does Grand Union consider this a lease so far as they are concerned, in force to date? A. I would think so. It is hard to say. Our authorities are divided between the division office and the headquarters office.

* * *

[8] WITNESS DRIPPS (Resumed)

THE COURT: You may proceed, gentlemen.

CROSS EXAMINATION (In Excerpt)

BY MR. MAGEE:

Q. Mr. Dripps, attached to this exhibit is a plat. By "this exhibit" I am referring to Defendant Exhibit number one, Mr. Luxemberg.

MR. WISE: That is an exhibit for identification. It has not been admitted.

MR. MAGEE: For identification. It has not been offered in evidence.

BY MR. MAGEE:

Q. You have identified the area in blue as the parcel of land on which the temporary shopping center is located; is that correct, Mr. Dripps? [9] A. Yes sir, I have.

Q. Now Mr. Dripps, you have testified that this is C-1, zoned C-1; is that correct? A. Yes, I have.

Q. Under C-1 zoning this area is available for the construction of shopping centers and apartments; is that correct? A. I am not qualified to answer that question.

THE COURT: Well, Mr. Dripps, aren't you qualified to answer the C-1 part of it?

THE WITNESS: Yes, sir, because I could read it in the zoning regulations. My position is that I am not the zoning administrator of the District of Columbia.

THE COURT: C-1 is commercial one, isn't it?

THE WITNESS: Yes, sir.

BY MR. MAGEE:

Q. And on Commercial one you can erect shopping centers for grocery stores and the like; is that correct? A. May I speak to my counsel for a moment?

THE COURT: Certainly.

(There was a brief off-the-record discussion between the witness and Mr. Cashman.)

MR. MAGEE: I think Mr. Cashman will stipulate to save time. I think he will stipulate on C-1 property [10] you can construct shopping centers for commercial uses and you can construct apartments.

MR. CASHMAN: I will stipulate that, your Honor.

THE COURT: I did not know that you could construct apartments, can you?

MR. CASHMAN: Yes, sir, yes, you can, Your Honor.

THE WITNESS: The only reason I hesitated is that it is not my official function.

BY MR. MAGEE:

Q. So that in regard to the plat, with respect to constructing a shopping center which is the area outlined in red, that is permissible under C-1 Zoning, according to the stipulation of your counsel? A. Yes, it is.

Q. And shown are four sites. Assuming they are apartment sites, according to the stipulation of your counsel, those could also be constructed in a C-1 area; is that correct? A. Apartments could be constructed in a C-1 area.

* * *

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 20,204

DAVID LUXENBERG,
Appellant,

v.

MAYFAIR EXTENSION, INC.,
a corporation,
GOSPEL SPREADING ASSOCIATION, INC.,
a corporation,
L. S. MICHAUX,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WARREN E. MAGEE
THOMAS G. LAUGHLIN
HANS A. NATHAN
1730 K Street, N.W.
Washington, D.C.
Attorneys for Appellant

Of Counsel
MAGEE & BULOW
1730 K Street, N.W.
Washington, D.C.

STATEMENT OF QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the court below erred in dismissing the Cross Complaint of appellant, David Luxenberg.

2. Whether the court erred in not entering a judgment in favor of the appellant Luxenberg against the appellees and cross defendants.

3. Whether the court erred in not entering a judgment in favor of the appellant against the appellees in damages for anticipatory breach of appellant's lease in the sum of Eighty One Thousand Dollars ($81,000.00).

INDEX

TABLE OF CASES

TREATISES

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Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

I. JURISDICTIONAL STATEMENT

The plaintiffs below, Commissioners of the District of Columbia, filed a Complaint for Injunction against Mayfair Extension Incorporated [1] as the owner of premises known as Parcel 177/82 in the northeast section of Washington, D.C., on which defendant Mayfair under

[1] Hereinafter referred to as Mayfair.

permits obtained from the Commissioners, commencing on August 5, 1946, constructed a two-story, brick and frame, shopping center. The Complaint alleged that this shopping center was constructed under a temporary building permit and under renewal arrangements made between the Commissioners and Mayfair this shopping center should have been removed two years after the termination of the National Emergency. The Complaint alleged the National Emergency terminated on April 29, 1952 by Presidential Proclamation 2974, hence, Mayfair was required to raze the shopping center.

Mayfair filed a Third Party Complaint against David Luxenberg [2] alleging Luxenberg was a tenant occupying the premises under a Lease Agreement (Exhibit B to the Third Party Complaint). Exhibit B was an exclusive lease between Mayfair and Luxenberg and one Barney Moder as lessees, dated November 9, 1951, for a term of five years, with an option to renew the lease for five additional years. Mayfair, in the Third Party Complaint, prayed, should the Court order the shopping center demolished, that Luxenberg be ordered to vacate the premises to permit such demolition (J.A. [3] 5).

Luxenberg answered the Third Party Complaint, denying knowledge of the arrangements existing between the Commissioners and Mayfair, and filed a Cross-Claim against Mayfair, alleging the exclusive lease dated November 9, 1951 had been complied with by Luxenberg and Luxenberg paid Mayfair the rentals provided for in this exclusive lease. Luxenberg's Cross-Claim continued the following allegations proven at the trial: The lease gave Luxenberg the exclusive right to conduct a food store in the premises involved for the duration of the lease and made the lease applicable to any building of Mayfair, replacing the leased premises, for the unexpired term of the lease (J.A. 51). On

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[2] Hereinafter referred to as Luxenberg.

[3] J.A. refers to the Joint Appendix filed with this Brief.

November 5, 1955 Barney Moder assigned for a consideration his interest in the lease to Luxenberg. (J.A. 33). On August 9, 1961, the lease agreement of November 9, 1951 was amended by extending the term of the lease for a period of five years with the option to renew the lease for a period of five years from November 15, 1966. The amendment of August 9, 1961 contained the following provision in paragraph 6 thereof:

> (6) The terms and conditions of the aforesaid lease granting to the lessees therein named the first option to lease the said food and grocery facilities which might replace the existing premises after the possible demolition thereof shall remain in full force and effect in favor of the lessee except only that the rate of rental to be paid in such case shall be in an amount equal to a bona fide offer which the lessor may receive from another prospective tenant under like conditions as those in favor of the lessee, and in such case the lessee shall have thirty days from the date of the receipt by him of notice of the terms and conditions of said bona fide offer within which to elect to exercise said option to lease the said replaced facilities.

(J.A. 57) Luxenberg under the agreement of August 9, 1961 renewed the lease for an additional five years from November 15, 1966 (J.A. 60). Mayfair and its agents entered into an arrangement with the Grand Union Company[4] to wrongfully deprive Luxenberg of his lease as amended and extended and to oust Luxenberg from the leased premises and to that portion of the new premises to be constructed on the land of Mayfair for grocery store purposes, when built, and Mayfair entered into a binding lease on Luxenberg's space in the newly constructed building to a competitor, Grand Union, thus breaching Luxenberg's lease as amended and extended, to Luxenberg's damage. Luxen-

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[4] Hereinafter referred to as Grand Union.

berg demanded damages in the total sum of $161,000.00. together with interest thereon (J.A. 6-14).

Mayfair. in its Answer to the Cross-Claim, again admitted that it had leased the premises to Luxenberg, but denied the existence of any lease with Grand Union (J.A.). The action was advanced for trial on Motion of Luxenberg. The case was pretried and Mayfair again denied the existence of the Grand Union lease. The action came on for hearing before Judge Walsh of the court below and a jury on September 13. 1965. Luxenberg withdrew his demand for a jury trial, which was consented to by all parties involved and the case was tried to the court without a jury on September 13th and 14th, 1965.

At the conclusion of all the evidence, Luxenberg moved that Gospel Spreading Association, Inc.,[5] a corporation, and Elder L. S. Michaux,[6] an individual, be added as parties and aligned as defendants and cross-defendants in the action. Counsel for appellees consented to this Motion in open court (Tr. 121). On October 14, 1965 the cou.. below entered Findings of Fact and Conclusions of Law in favor of the original plaintiffs, the Commissioners of the District of Columbia, sustaining the Complaint of the Commissioners, and concluding that the Commissioners were entitled to the relief sought and ordered the razing of the shopping center more particularly described in the Complaint (J.A. 19). No appeal was taken from this Judgment of the court below.

On October 15, 1965 the court below granted Luxenberg's Motion and entered an Order adding Gospel and Michaux as parties and aligned them as defendants and cross-defendants in the action and permitted Gospel and Michaux to adopt the pleadings of Mayfair and to take the

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[5] Hereinafter referred to as Gospel.

[6] Hereinafter referred to as Michaux.

position that no further evidence need be adduced in the action on behalf of Gospel and Michaux. In its Order of October 15, 1965 the court below further held that all Orders and judgments entered and to be entered in the action are to be binding upon Gospel and Michaux (J.A. 19).

On January 20, 1966 the court filed a Memorandum Opinion in the action below. The court below first found as a fact that Luxenberg had a lease on the premises in question which was modified by the agreement dated August 9, 1961 and that by letter dated April 19, 1963 Luxenberg exercised his option to extend the lease for an additional five years from November 15, 1966, which lease, amendment and extension were recorded with the Recorder of Deeds of the District of Columbia on September 24, 1964 (J.A. 19). The court further found that Mayfair, a Maryland corporation, was the owner of the land in question, that 60% of its stock was owned by Gospel and 40% by Michaux. Michaux, President of Mayfair and Gospel, and Gospel, on May 14, 1964, entered into a lease agreement with the Grand Union under the terms of which new lease appellees agreed that for a period of three years after any termination of the lease the landlord shall neither use nor permit the use of the premises, nor any part thereof, for a food market, and covenanted and warranted lessor's full right and authority to enter into the lease and all extensions thereof, and that the land was free from all occupancies, tenancies and any other encumbrances. The court below made the novel finding that Mayfair repudiated the Luxenberg lease and then reaffirmed the Luxenberg lease, and, on the theory that the repudiation of the lease was retracted, held, notwithstanding that Luxenberg had the power to perform his part of the contract as amended and extended, and notwithstanding that the Grand Union lease was incompatible with the Luxenberg lease, putting performance of appellant's lease beyond appellees' power to perform, there was no anticipatory breach. Hence the court below

dismissed appellant's Cross-Claim and entered judgment in favor of the appellees (J.A. 27).

On February 24. 1966 appellant filed a Notice of Appeal from the Order and Final Judgment entered by the court below on January 28, 1966. dismissing appellant's Cross-Claim.

This Court has jurisdiction of the appeal under 28 U.S.C. 1291 and 1294.

II. STATEMENT OF THE CASE

On the issues framed under the Cross-Complaint of appellant and the Answer thereto of the appellees at the hearing held in the court below on September 13th and 14th, 1965 the following undisputed evidence was adduced:

William M. Dripps. Superintendent of the Inspection Division of Licenses and Inspections of the District of Columbia, testified in regard to Luxenberg's Exhibit No. 1, the lease between Gospel and Grand Union, that the area in blue in the plat attached to this lease was the area of the temporary shopping center involved in the action, that this area was zoned C-1, which means Commercial-1. During the course of this testimony the Corporation Counsel for the Commissioners stipulated that on this area zoned Commercial-1 there could be constructed the shopping center and apartments shown on the plat annexed to Luxenberg's Exhibit No. 1. Mr. Dripps further testified that the shopping center outlined in red on the plat and the apartment shown on the plat were permissible under the C-1 zoning and could be constructed on this area (J.A. 8-10).

Stanley Freed, the local real estate representative of Grand Union, testified that Grant Union operates approximately 500 stores and its gross sales approximate $740,000,000 a fiscal year. Mr. Freed testified further. Pursuant to a subpoena, he produced a lease executed

between Grand Union and Gospel which was marked Luxenberg's Exhibit No. 1. This lease was executed on behalf of Gospel by Michaux and on behalf of Grand Union by its Vice-President. The lease covers an area of 14,000 square feet and concerns the property located on Kenilworth Avenue at Hayes Street, N.E. There is a plat of the property attached to the lease. Paragraph 43 of the lease requires the landlord to build, and if construction is not commenced on or before January 1, 1965, the tenant may cancel the lease; that Grand Union has never exercised its right to cancel the lease and that the lease is in force and has never been cancelled by Grand Union. Mayfair objected to the lease being received in evidence because it was executed by Gospel and not Mayfair. The court reserved ruling on the admissibility of the lease (J.A. 33, 34).

Luxenberg called as his next witness L.S. Michaux, President of Mayfair and Gospel. Michaux testified on August 9, 1961 he was President of Mayfair; he was President of Mayfair at the time of trial and was also President and chief executive officer of Gospel. Michaux testified he was authorized and had full authority to bind Mayfair by lease and to bind Gospel by lease. Mayfair testified Gospel owns 60% of the stock of Mayfair and Michaux owns 40% of the stock of Mayfair. Michaux testified Gospel and Michaux control Mayfair. Michaux admitted the execution of the agreement of August 9, 1961 (Luxenberg's Exhibit No. 2), that this lease was amended on November 9, 1951 and was signed by him as President of Mayfair. Michaux described Gospel as "my" corporation. Michaux admitted, and his counsel also admitted, that the Luxenberg lease (Luxenberg's Exhibit No. 2) by letter dated April 9, 1963 had been extended for a period of five years from November 15, 1966. Michaux admitted that the sum of $15,000 described in the Luxenberg lease (Luxenberg's Exhibit No. 2, page 1) had been paid by Luxenberg to Mayfair for good will and that Luxenberg had paid $1,000 under the agreement of August 9, 1961 (Luxenberg's Exhibit 2, pp. 4(a)) to Mayfair for fixtures (J.A. 30, 31).

Defendant Luxenberg's Exhibit No. 1 was received in evidence. Defendant Luxenberg's Exhibit No. 2 was received in evidence.

Luxenberg testified he executed the original lease, with Mr. Moder on November 9, 1951, and that he had negotiated this lease with Mr. Albert I. Cassell, the Executive Vice-President of Mayfair who was managing its affairs at that time. Luxenberg testified that Cassell advised him when any new facility was constructed, Luxenberg would have the exclusive right to move into that facility and to rent the same amount of space for a grocery store, which space amounted to 2500 square feet. Luxenberg testified he bought out his partner, Moder, and became the sole owner of the lease by paying $5,000 as consideration for this purpose for the good will which had been created by the grocery operations on the site since November 9, 1951. Luxenberg testified he paid Mayfair $15,000 for good will, as recited in the lease of November 9, 1951, and paid $1,000 for fixtures, as recited in the agreement of August 9, 1961. Luxenberg testified that his profits for the years 1961 through 1964 were as follows: 1961, $13,000; 1962, $12,500; 1963, $12,000 and 1964, $9,000. Luxenberg testified his average profits over this four year period totalled per annum $10,300.00. Luxenberg testified he lived up to the terms of his lease, paid all the rents due thereunder and was willing to pay in any new space the rental per square foot that Grand Union would pay. Luxenberg testified Mayfair over the years permitted other stores in the shopping center to sell groceries, contrary to the exclusive provision of his lease, but was advised by his attorney not to raise any questions concerning this breach of his lease if he wanted to lease space in the new building to be built by Mayfair on the site in the future.

Richard Watkins, a certified public accountant, testified he worked on and assisted in the preparation of Luxenberg's income tax returns. Watkins testified he was familiar with Luxenberg's income tax returns

and had copies of the returns before him for the years 1961, 1962, 1963 and 1964. Watkins corroborated the profit figures testified to by Luxenberg for the years 1961 through 1964. Watkins testified the average annual profit for the four years from 1961 through 1964 exceeded $10,000.00 (J.A. 39-41).

Mayfair called as its first witness Wallace B. Agnew, Vice-President in charge of real estate and commercial leasing for Walker & Dunlop, Inc. Agnew testified he had many years of commercial real estate experience, studied law and taught real estate leasing. Agnew testified he represented Mayfair and Michaux and identified correspondence marked Mayfair Exhibits 1 and 2. Agnew testified on August 5, 1964 he sent Mayfair Exhibit No. 1, an order to Luxenberg to vacate his grocery store. On September 1, 1964, Agnew testified, that he learned for the first time that his letter of August 5, 1964 was a mistake and by Mayfair Exhibit No. 2 attempted to revoke it. Early in September 1964 Agnew had learned at a conference in his office for the first time that the Luxenberg lease dated November 9, 1951 had been extended for five years from November 15, 1966. Agnew testified Michaux had not informed him of this extension prior to this meeting, and he had not seen copies of either the extension agreement to Luxenberg's lease or the letter of Luxenberg extending the lease for five years. Because of this information Agnew withdrew Mayfair's notice to Luxenberg to vacate his grocery store. Agnew testified he negotiated the lease between Gospel and Grand Union (Luxenberg's Exhibit No. 1). Agnew admitted after demolition Luxenberg's lease will continue and will apply to any replacement premises built by Mayfair or Gospel. Agnew testified Luxenberg's exclusive continues under his lease conditions and the only thing Luxenberg had to meet to obtain his exclusive grocery facility would be to meet the rate of rental in any offer obtained by Mayfair. Agnew testified Luxenberg's rental was about $1.44 per square foot and that the rental which should be obtained on any new space should be between $1.25, $1.50 and $1.60 per square

foot. Agnew testified that had he known of the existence of the Luxenberg lease with Mayfair, he would never have authorized the preparation of the lease with Grand Union and would have prepared an option or letter of intent rather than a firm lease (Tr. 80). Agnew admitted that the lease of May 14, 1964 which he had negotiated with Grand Union for Gospel and Mayfair (Luxenberg's Exhibit No. 1) had never been cancelled by Grand Union and Grand Union wants this lease carried out and wanted to operate a grocery store under its terms. Agnew testified he delivered his entire file and the lease to counsel for Michaux around September of 1964. Agnew later changed this testimony and stated he had delivered his entire file except his copy of the lease of May 14, 1964 (Luxenberg's Exhibit No. 1), which copy of the lease he had delivered to counsel for Mayfair the night before. Agnew testified he was engaged in arranging financing for Mayfair, Gospel and Michaux. Agnew testified he arranged financing for 500 apartment units being built by Mayfair to the rear of the land in question, which were the units mentioned in the lease of May 14, 1964 (Luxenberg's Exhibit No. 1). Agnew admitted detailed specifications were attached to the lease but that the plans had not been prepared completely. Agnew testified in order to arrange financing to rebuild replacement facilities, he could obtain 100% financing where a lease like the Grand Union lease of May 14, 1964 was involved, whereas if financing was to be based on a lease to a local chain, only 60% of the construction funds could be financed. Agnew testified if an individual were involved, like Luxenberg, he did not know what percentage could be obtained to finance the new facility and any refinancing involving Luxenberg would require Michaux to put a very substantial amount of cash in the refinancing, whereas no cash would be needed if Grand Union were involved. Agnew testified all of his information came personally from Michaux; Michaux had informed him Gospel was the owner of the land in question and this was the reason there was inserted in the lease a title warranty that Gospel owned the land. Agnew admitted under the court's questioning that had he been

informed of the true facts, he would never have authorized the execution of the Grand Union lease (J.A. 47-48).

Odell Walker testified he was manager of Mayfair and had been manager of Mayfair for Michaux since 1945. Walker testified he was managing the shopping center and collected the rents. Walker testified he was not the manager of the shopping center when Luxenberg became a tenant. Walker testified he had discussions with Luxenberg concerning the possibility of tearing down the building but that this had occurred on or about the time when hearings were held before the Appeals Board of the District of Columbia years after Luxenberg had executed his lease.

Luxenberg testified in rebuttal that his first conversation with Mr. Walker concerning the tearing down of buildings occurred at or about the time of the Appeals Board hearings, which occurred in 1963.

At the conclusion of the evidence Luxenberg moved, because of the facts which had been involved in the evidence which showed a commingling of the corporate and personal activities of Mayfair, Gospel and Michaux concerning the land in question, and because of the ownership of Mayfair by Gospel and Michaux, that Gospel and Michaux should be added as parties defendant to the action. Counsel for Mayfair, for Gospel and for Michaux consented to the granting of this motion in open court. On October 14, 1965 the court below entered Findings of Fact and Conclusions of Law in favor of the original plaintiffs, the Commissioners of the District of Columbia, and entered a judgment ordering the razing of the shopping center described in the Complaint. No appeal has been taken from this aspect of the case (J.A. 19). On October 15, 1965 the court below entered an Order adding Gospel and Michaux as parties, aligning them as defendants and cross-defendants, permitted them to adopt the pleadings of Mayfair and to take the position that no further evidence need be adduced in this action on behalf of

Gospel and Michaux and ordered that all orders and judgments entered and to be entered in the action are to be binding upon Gospel and Michaux (J.A. 18).

On January 20, 1966 the court below filed a Memorandum in which is set forth what the court described to be the facts of the case. In its Memorandum the court below stated that he had found for the plaintiffs in the original Complaint. The court further stated he had granted Luxenberg's motion to add as defendants Gospel and Michaux and that the question before the court on Luxenberg's Cross-Complaint for damages was whether there was an anticipatory breach of Luxenberg's lease agreement. The court found for the cross-defendant, stating the case did not present an anticipatory breach. The court found that Mayfair entered into the lease dated November 9, 1951 which gave Luxenberg the exclusive right to conduct a food store in the premises for the duration of his lease, with the full option to lease the food market and grocery facilities in any replacement facilities for a term at least equal to the unexpired term of the lease. The court further found that this lease was modified by the agreement dated August 9, 1961, extending the original lease, and that this amendment gave Luxenberg the first option to lease the said food and grocery facility which might replace existing facilities after demolition thereof, and that the lease shall remain in full force and effect in favor of the lessee at the rate of rental to be paid in such case equal to the rental offered by a bona fide offer from a prospective tenant under like conditions as those in favor of the lessee, and Luxenberg had the right to extend the lease for a period of five years from November 15, 1966, which Luxenberg by letter dated April 19, 1963 exercised, and extended the lease for an additional five years from November 15, 1966 (Luxenberg Exhibit No. 2). The court found that the lease, amendment and extension were recorded on September 24, 1964 (J.A. 19-27). The court further found that Mayfair was the fee owner of the land which is the subject of the liti-

gation; that 60% of the corporate stock of Mayfair is owned by Gospel and 40% is owned by Michaux; that Michaux is the President of Mayfair and also President of Gospel; Gospel is a District of Columbia corporation and Gospel entered into a lease agreement with Grand Union on May 14, 1964, which leased space in the shopping center to be constructed at the northwest side of Kenilworth Avenue, between Hayes and Jay Streets, N.E., Washington, D.C. being the same property that is the subject of the Luxenberg-Mayfair lease. The court found in the May 14, 1964 lease that Gospel agreed with Grand Union that if the lease were terminated, that for a period of three years after such termination, the premises shall neither be used nor permitted to be used, or any part thereof, as a super market, and that Gospel warranted its full right and authority to enter into the lease and that there was no occupancy, tenancy or other encumbrance on this land. The court further found that Mayfair repudiated and then reaffirmed the Luxenberg lease, in that on August 4, 1964 Mayfair, through Walker & Dunlop, Inc., wrote Luxenberg and ordered him to vacate the premises on or before October 1, 1964 but that Walker & Dunlop, Inc. sent another letter on September 19, 1964 attempting to cancel the letter of August 4, 1964 and attempting to reaffirm the lease dated November 9, 1951 as amended. The court below then brushed aside the legal fact of the binding lease with Grand Union over the same property under which Grand Union leased the same property from Mayfair, Gospel and Michaux, and under which the lessors warranted their title and agreed to construct a new facility for the Grand Union by December of 1965 and gave Grand Union the exclusive right to operate a grocery facility in the premises and held Mayfair had not reached a point where Mayfair was obligated to perform at all and that there was no continuing obligation from Mayfair to Luxenberg; therefore, as the breach and repudiation were retracted, notwithstanding Luxenberg has the power and ability to perform his part of the contract and held Luxenberg was

not entitled to recover because the court was unable to determine if Mayfair intended to breach the lease with Luxenberg or with Grand Union.

From the evidence adduced, appellant contends that the court should have found in his favor, should have found that appellees are guilty of an anticipatory breach of Luxenberg's lease as amended and extended, and appellant was entitled to recover as damages for his anticipatory breach the amount of damages established by the undistributed evidence in the total sum of $81,000.

STATEMENT OF POINTS

1. The Court below erred in not finding that the Appellees (Cross-Defendants below) had committed an anticipatory breach of Appellant's lease giving Appellant the right to treat the lease as broken and giving Appellant the right to recover his damages for a total breach and in dismissing the Cross-Complaint of Appellant (Cross-Plaintiff below).

2. The Court below erred in not awarding Appellant a judgment for his damages against Appellees on the undisputed evidence of damages, in the sum of $81,000.00, as demanded.

IV. SUMMARY OF ARGUMENT

A. Appellant contends when appellees entered into the firm and binding lease with Grand Union, with warranties of title and quiet possession in favor of Grand Union, this put the performance of appellant's lease out of the power of appellees to perform. Where one party to a contract puts it out of that party's power to perform, the other party may regard the contract as terminated and is entitled to recover all damages resulting from such an anticipatory breach.

B. Appellant, because of appellees' breach of appellant's lease,

was entitled on the undisputed evidence before the court below to recover, first, appellant's costs, that is, what he expended towards performance, consisting of $15,000.00 paid to appellees for good will, $1,000.00 paid to appellees for fixtures, $5,000.00 as an additional payment for good will, and, second, the profits that he would realize by performance of the whole contract, that is, a minimum of $10,000 per year for the balance of the term of appellees' contract, being the sum of $60,000.00. The undisputed evidence established appellant was entitled to a judgment in the sum of $81,000.00 and it was error for the court below not to so order.

V. ARGUMENT

(A) The Court Erred in Not Finding That There Was an Anticipatory Breach Entitling Luxenberg To Recover Damages.

The evidence adduced at the trial established and it was admitted, appellant had a valid lease on the premises in question for five years from November 15, 1966. Actually appellees have admitted the validity of Luxenberg's lease and that it is operative for five years from November 15, 1966 and the court below so found (J.A. 22, 23).

Appellees, all of whom are bound by the Luxenberg lease, by their actions have put the performance of that lease beyond their power to perform and Luxenberg's evidence established these acts breached appellant's exclusive contract of lease, terminated it and because of such breach and termination, appellant is now entitled to recover all of the damages he sustained by such termination and breach.

The undisputed evidence in the trial below establishes the following undisputed facts:

The lease agreement of November 9, 1951 between Mayfair, Luxenberg and Moder, as amended by the agreement of August 9, 1961, has been extended for a period of five years from November 19, 1966 and is binding on appellees (Luxenberg's Exhibit No. 2). This lease gives Luxenberg exclusive right to operate a grocery store on the land in question in the shopping center which was ordered razed by the court below and in any new facility built by Mayfair, Gospel and Michaux on this land, the only obligation being that Luxenberg pay the same rent offered by another bona fide prospective tenant for like space. Luxenberg testified that he was willing to pay the rate provided for in the Grand Union lease (J.A. 36).

Appellees, without disclosing to their agent, the witness Agnew, of Walker & Dunlop, Inc. that the Luxenberg lease had been extended for

five years from November 15, 1966, authorized and had Agnew prepare and have executed a new and binding lease on the same land with Grand Union, which was executed on May 14, 1964 (Luxenberg's Exhibit No. 1) (J.A. 46-48).

The lease agreement of May 14, 1964 (Luxenberg's Exhibit No. 1, paragraphs 11 and 12) contains binding covenants and warranties that Grand Union may use the premises for the purposes contemplated in the lease and any extension thereof, exclusive of all others, and that there were no occupancies, tenancies or other encumbrances on the premises. The lease negotiated by Agnew as the agent of appellees, of May 14, 1964, was executed prior to the recordation of appellant's lease as amended and extended which was recorded on September 14, 1964.

The Grand Union lease of May 14, 1964 leases until July 31, 1980 "for itself, its officers, employees, patrons and invitees" 18,000 square feet of space in the facility which is to be constructed under the terms of the lease, with the right to renew the lease for three successive extensions, each such extension to be for a period of five years, that is, for an additional fifteen years. Grand Union has not exercised its right to cancel the lease of May 14, 1964, considers that lease to be valid and binding and intends to rent and utilize the space described in the lease for the exclusive sale of groceries and related commodities by Grand Union (J.A. 85 and J.A. 45).

The 500 apartments which are described in the lease of May 14, 1964 have been financed and at the time of the trial were under construction. The Grand Union lease of May 14, 1965 further provides should Grand Union exercise its rights to cancel, that the landlord shall neither use nor permit the premises, or any part thereof, or the shopping center, to be used for a food market. The Grand Union lease of May 14, 1964 binds Mayfair, Gospel and Michaux to construct the new facility by December, 1965. The execution of the firm lease of

May 14, 1964 which binds appellees insofar as Grand Union is concerned, and the efforts of appellees and their agents, to force appellant out of the premises, even prior to its demolition, constitute a breach of the existing lease between Mayfair and Luxenberg as amended and extended (Luxenberg's Exhibit No. 2) and is anticipatory in nature.

The undisputed testimony of Agnew, the agent of appellees, which was not denied by Michaux, not controverted in any way, is that the actual ownership as distinguished from the record title to the land described in the leases received in evidence is vested in Gospel and he was so informed by Michaux, and because of this ownership of title in Gospel, Agnew caused the lease of May 14, 1964 with Grand Union to be executed with firm and legal binding warranties that Gospel was the owner of the property leased and that no occupancies, leases or encumbrances of any kind would impair Grand Union's lease of the premises. Mr. Agnew, agent for appellees, testified under questioning by the court that had he known that the Luxenberg lease had been amended and extended for a period of five years from November 15, 1966, he would never have caused to be executed the lease between Gospel and Grand Union and he would only have taken an option or letter of intent from Grand Union.

While the court below found the Luxenberg lease to be valid and binding for five years from November 15, 1966, the court brushed aside the firm and binding lease on the newly constructed premises dated May 14, 1964 leasing the newly constructed premises until July 30, 1980 with renewal rights for an additional fifteen years. That lease also contained a firm obligation on the part of the lessors to build the facility by December of 1965 and to engage in the construction of 500 additional housing units in the area. If Mr. Agnew is to be believed, Mayfair transferred all of its rights to the property in question to Gospel, and Gospel with warranties of ownership and with warranties that

no occupancies or leases existed on the site, entered into a firm and binding lease which binds appellees with Grand Union. In furtherance of the lease agreement with Grand Union, appellees are in the process of constructing 500 apartments units in the immediate area.

Where one party to an executory contract puts it out of his power to perform it, the other party may regard the contract as terminated and demand whatever damages he has sustained thereby. This principle has been settled law since the early case of *Lovell v. St. Louis Mut. L. Ins. Co.* (1884) 111 U.S. 264, 4 S.Ct. Rep. 890. In *Lovell*, Lovell had taken out a policy of insurance with the St. Louis Mutual Life Insurance Company. This was a paid up policy. St. Louis Mutual Life Insurance Company thereafter sold out to the Mound City Life Insurance Company, who took over the name of the St. Louis Life Insurance Company. Plaintiff contended that this action, even though the successor company was issuing him a paid up policy, constituted a breach of contract, that the policy was forfeited and he was entitled to recover its paid-up value. The question was whether the transfer of the insurance business from one company to another constituted an anticipatory breach of contract authorizing Lovell, the insured, to sue for the paid-up amount of his policy. In deciding such actions constituted an anticipatory breach of contract and that Lovell could recover damages therefor, the Supreme Court held as soon as the insurance company had transferred its assets to another company there was no further duty on the part of Lovell to continue to pay premiums and he was entitled, as damages, to recover the paid up amount of his policy. In upholding Lovell's right to recover damages because of an anticipatory breach of contract, the Supreme Court held (p. 395):

> Our second conclusion, that the complainant was under no obligation to continue his insurance in the new company, we think is equally clear. He had nothing to do with that company; it was a stranger to him. It is true that it received all the old company's assets,

and assumed all its obligations on policies and otherwise; and the complainant was relegated to the new company for the obtainment of his rights, whatever they were. But that was a transaction between the companies themselves, with which he had nothing to do; and under such a total change of relations and parties, it would be most unreasonable that he should be compelled, against his will, or with the alternative of abandoning all his rights, to continue all his life to fulfill an executory contract by the payment of premiums to a company to which he was a total stranger, and in which, perhaps, he reposed no confidence whatever, or to take a paid-up policy in such company.

* * *

Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of U.S. v. Behan, ante, 81, to which we refer. It is unnecessary to discuss it further here.

It was intimated in the trial court's findings because the new facility had not yet been built, as the final plan for it had not been prepared by the architect, this failure to build the new facility which appellees agreed to do under the lease of May 14, 1964 bars appellant's right to recover damages for breach of contract. We submit that this Honorable Court has determined this question, and in favor of Luxenberg's contentions here. In *Friedman v. Decatur Corporation* (C.C.A.

1943), 77 U.S. App. D.C. 326, 135 F.2d 812, a similar question was presented for decision. In *Friedman,* Decatur had entered into a contract to sell property to Friedman. The contract required that the sale would be null and void unless the property was made available for industrial use or in the event the party of the second part was unable to obtain wharfage facilities and the privilege of running a pipe line from said wharf to the property. In addition, the contract required Decatur to furnish a good and marketable title to all the lands described in the contract to Friedman. Friedman contended, notwithstanding that Decatur had obtained a rezoning of the property and had procured legislation authorizing the laying of pipe lines to the pierhead line in the Anacostia River, Decatur had not obtained wharfage facilities and could not convey a good title to the lands because it did not own all of the property covered in the contract. The evidence showed that prior to any attempted settlement of the contract, Friedman advised Decatur that a deal which Friedman had with an oil company concerning this land had not gone through and he would not go through with his contract. Decatur contended it did not obtain the wharfage and did not acquire the rest of the property involved in the contract for reconveyance to Friedman because the actions of Friedman constituted an anticipatory breach, which entitled Decatur to sue for damages. In upholding Decatur's position, this Court held (p. 328):

> Appellant contends, in the alternative, that, even if the agreement is construed to be a bilateral contract, nevertheless, appellee was not entitled to recover unless he had performed the condition. It is true, as a general rule, that such a condition must be exactly fulfilled, or no liability can arise on the promise which it qualifies. But this is subject to the exception that, if performance of the condition is excused, the promise becomes enforceable. Such an excuse may be found from the fact that, even had the promisee performed the condition, the promisor would, nevertheless, have failed to carry out his promise.

> The record in the present case shows that there was such an anticipatory breach. Between May 31 and the following September, appellee had made considerable progress in satisfying the conditions precedent. It had obtained a rezoning of the property to permit industrial use, and had procured the enactment of legislation which authorized the Commissioners of the District to permit the laying of pipe lines for the carriage of petroleum products from the property to the pierhead line of the Anacostia River. It had not yet obtained wharfage facilities. In September, 1935, appellee inquired of appellant concerning the type of wharf which he desired, and the desired location of the pipe lines. It suggested that the necessary applications should be submitted to secure permits for the wharf and pipe lines. Appellant then revealed that he did not intend to go through with the contract until he had worked out a deal with an oil company; and requested that appellee hold up the further performance of the contract and the submission of applications for permits. In January, 1936, appellant advised that his deal with the oil company had not gone through, and that his performance of the contract looked rather hopeless. Early in February, appellant informed appellee that, as his deal with the oil company had not gone through, he could not, and would not, go through with his contract of May 21, 1935. This was clearly sufficient to bring the case within the exception to the general rule, because of excuse resulting from an anticipatory breach.

In support of this holding that where one party by his conduct establishes that he is not going through with an existing contract, such is an anticipatory breach, entitling the other party to sue immediately for damages, this Court cited and relied upon the following authorities:

> *Miller v. Schwinn*, 72 App. D.C. 282, 284, 113 F.2d 748, 750;
> *Roehm v. Horst*, 178 U.S. 1, 13, 20 S. Ct. 780, 44 L. Ed. 953;

Landvoigt v. Paul, 27 App. D.C. 423, 432;
Sheffield v. Paul T. Stone, Inc., 68 App. D.C. 378, 98 F.2d 250

Friedman is the law of anticipatory breach in the District of Columbia. Subsequent cases have followed *Friedman*. Thus, the court below in *Burke v. Thomas J. Fisher & Company, Inc.* (D.C. D.C. 1955), 127 F.Supp. 1, followed *Friedman*. In *Burke*, an action was brought by a purchaser for damages arising out of a loss of a sale concerning certain real estate. Defendant, i.e., the seller to the agreement contended that he had notified the purchaser he was ready to perform, but the purchaser notified the seller he would not perform the contract. In *Burke*, it was shown, in the course of discussions the purchaser refused to honor a demand for performance. No tender of a deed was made by the seller. Yet the seller forfeited. In holding that the contentions of the purchaser based on a lack of tender could not defeat the seller's counter-claim for damages, the court below, speaking through Judge McLaughlin, held (p. 3):

> As a general rule it is, of course, true that all conditions in the contract must be fulfilled except when the performance of the condition is excused or when it is so apparent that even if there were performance the other party to the contract would nevertheless refuse to carry out its obligation. Friedman v. Decatur Corporation, 1943, 77 U.S. App. D.C. 326, 135 F.2d 812.
>
> The seller was already substantially notified that the purchaser was not ready to perform its obligations under the contract. Hence to require the seller to do anything further under the circumstances would be to stand on useless ceremony and it is well settled that the law does not require performance of a useless act. See 55 Am. Jur. 754, Vendor and Purchaser, Sec. 325.

> Thus, in the Court's opinion, no actual manual tender was necessary under the facts of this case. Cf. Hazleton v. Le Duc, 1879, 10 App. D.C. 378, at page 395 et seq. and cases cited therein. The evidence submitted by the purchaser upon the question as to why the settlement was not effected by the parties is clearly wanting in legal sufficiency. The facts show that the seller was ready, willing, and able, and even offered to perform his part of the contract and that the purchaser was well aware of his disposition. In the circumstances, considering the failure of the purchaser to meet the burden of proof imposed upon it the Court concludes that the declaration of forfeiture by the seller was proper, and holds that the seller is entitled to one-half the deposit in accordance with the terms of the contract.

Friedman was also followed in *United States v. Buffalo Coal Mining Company* (C.C.A. 9, 1965), 343 F.2d 561.

This Court has held that where one party to a lease agreement by his conduct breaches that agreement, the other party is entitled to treat the lease as ended and to recover damages for his losses. Thus, in *Schwartz v. Westbrook* (C.C.A. D.C. 1946), 81 U.S. App. D.C. 64, 154 F.2d 854, where a party was unable to perform under a ten year lease because of a covenant in his deed, in holding the other party could recover damages for breach of such a lease, this Court said (pp. 855-856):

> The damages alleged by plaintiff in his complaint and recovered in the court below are only those losses sustained by reason of his necessary preparations to occupy the premises. No claim is made for the loss of prospective profits during the term of the lease contract. Thus, the question presented is a narrow one: Is the lessee chargeable with notice of the lessor's record title so that he may not recover the loss sustained in preparing to occupy the premises which the

lessor is unable to deliver by reason of a limitation in his deed? We think not. Even though it be granted that, as to a stranger to the lease contract, the lessee is chargeable with notice of the record title to the land, that situation is materially different from one where, as here, the lessor attempts to set up a restriction in his deed against one with whom he contracted to lease the property. It is obvious that here the defendant knew or should have known of the covenant. The deed under which he acquired the land and the report of the title company he employed at the time he purchased the property gave notice of the prohibition of its use for commercial purposes. Nevertheless, defendant entered a contract by which he impliedly warranted his title to the property and that the lessee would have quiet possession. See: 1 Tiffany, Real Property, 3rd Ed. 1939, pars. 90, 91, and cases cited. In the circumstances we do not think it incumbent upon the plaintiff to search his lessor's title. He may rely upon the warranty and, having done so, the negligence or forgetfulness of the defendant is no bar to his claim to be placed in the same position he would have been in had the contract not been made.

It is established law, when the owner of property leases such property so that the control and management of the property vests in a lessee, such leasing can be considered an anticipatory breach of an existing contract where that leasing interferes with the terms and conditions of the existing contract. Our contention is that the binding lease by appellees with Grand Union constituted an action which put it beyond the power of these parties to perform their obligations to appellant under his lease. This precise question was involved in the case of *White v. Lumiere North American Company* (1906), 64 Atl. 821, 79 Vt. 206. In *White*, the defendant company employed the plaintiff in an advisory capacity for five years. One of his duties involved the management of the plant then owned by the company. Two years after

this contract was entered into, defendant company leased the plant involved in plaintiff's contract to another company for a period in excess of the unexpired portion of the plaintiff's contract. The contract between the defendant and the new company provided that the new company (the lessee) would continue to pay plaintiff's salary as long as he would make his services available to the new company. Plaintiff contended that the action of the defendant in leasing the plant constituted a breach and that he was no longer obligated to work for it or for the lessee. The Court of Appeals in Vermont, in upholding the plaintiff's position, held that the lease of the plant rendered the defendant company powerless to furnish the plaintiff with the work provided for in his contract and the provision in the lease that the plaintiff could work for the lessee and his salary would be paid by the lessee did not protect the defendant company. Accordingly, the Court of Appeals held that the plaintiff's contract to serve the defendant carried with it no implication that the plaintiff would serve the defendant's lessee, that the execution of the lease of the plant, including a transfer of all of the defendant company's rights to the plaintiff's services, terminated the contract. Of course, the transfer of ownership of Mayfair's property in Gospel, and Gospel's execution of a lease with warranties of title and exclusive possession to Grand Union, was an anticipatory breach of Luxenberg's lease by appellees.

In *Matthews v. Minnesota Tribune Co.*, 10 N.W. 2d 230, the Court upheld plaintiff's contention and allowed the plaintiff to recover damages for severance pay where the employer, a newspaper company, sold its newspaper to a third party, and this notwithstanding that under the sale and arrangement the third party operating the newspaper agreed to employ the plaintiff.

In *Gaspar v. United Milk Producers of California* (1944), 62 Cal. App. 2d 546, 144 P. 2d, the Court held, where an employer puts it out of his power to further performance on an employment contract by

selling his property, such a sale operates as a breach and discharge of the employees from any further performance under such contract.

Here, the facts are clear. Appellees put it beyond their power to perform under appellant's contract. Mayfair divested itself of ownership and placed that ownership in Gospel. Gospel leased the premises in question to Grand Union. Grand Union considers Gospel's lease binding and desires to operate a grocery store in the replaced premises. In the lease with Grand Union quiet enjoyment is given Grand Union, warranty of title is given Grand Union and Grand Union was given an exclusive right to operate a grocery business under a warranty and guaranty that no other occupancies or tenancies affect the premises. These actions clearly speak louder than words that appellees have breached appellant's lease by putting performance of his lease beyond their power.

As we pointed out earlier in this Brief this Court in *Friedman* cited with approval:

> *Miller v. Schwinn, supra.*
> *Roehm v. Horst, supra.*
> *Landvoigt v. Paul, supra.*
> *Sheffield v. Paul T. Stone, Inc., supra.*

In *Miller* one party to an agreement agreed to convey land, among other things, with "suitable and sufficient sewer and water services for the property." Prior to conveying the land agreed to in the contract, one party to the agreement perpetually and irrevocably granted to the Washington Suburban Sanitary Commission a strip of land six feet wide across one side of the site. *Miller* holds that the action of dedication put it beyond the power of one of the parties to the contract to fulfill a vital condition of the contract. *Miller* holds this action constitutes a breach and termination of the agreement.

Roehm, following *Lovell*, held (p. 785):

In *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U.S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390, a life insurance company had terminated its business and transferred its assets and policies to another company, and the court held that this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the insurance company, to wit, the death of the insured, had not arrived. Mr. Justice Bradley, delivering the opinion of the court, said: "Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby."

Landvoigt holds (p. 423, headnote 1):

> 1. A contract may be broken by a renunciation of liability under it in the course of performance, and suit may be immediately instituted, and, if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

In support of this holding this Court held (p. 432):

> So in this case the appellee refused at that time and at all times to perform his part of the contract,

> and the appellant was relieved from doing a vain thing. The appellee's refusal made a tender unnecessary. The appellant was ready not only to pay the cash payments of purchase money and to secure the rest, but was ready, on or before December 1st, 1897, to begin the construction of the second group of 5 houses, and also the third group. The record surely means so much. Upon the narrowest view of the evidence, it shows the appellant ready, willing, and able to carry out his part of the contract respecting the second group of houses, and the breach of the contract by the appellee in respect of that part of his contract fully supports the count in the declaration relating thereto.

Sheffield holds (p. 378, headnote 2):

> 2. Contract. Purchasers' repudiation of a contract for the construction and sale of a house by notifying seller that they would not complete contract was an anticipatory breach, and seller could elect to treat contract as terminated or continue to perform and demand performance by purchasers.

In this regard this Court held (p. 380):

> Plaintiff's repudiation of October 19 was an anticipatory breach only. Not because of the option clause but by a rule of contract law, upon that repudiation defendants could elect whether to treat the contract as terminated or to continue to perform and to demand performance.

The court below followed *Friedman* in *Burke v. Thomas J. Fisher and Company, Inc.* (D.C. D.C. 1955), 127 F.Supp. 1, 2. Likewise the Ninth Circuit followed *Friedman* in *United States v. Buffalo Coal Mining Company* (CCA 9, 1965), 343 F.2d 561. We also have pointed out that this Court reached a similar result in *Schwartz v. Westbrook* (CCA DC 1946), 81 U.S. App. D.C. 64, 154 F.2d 854, 855-856. Other authorities have followed *Lovell* and *Friedman*, namely: *White v.*

Lumiere North American Company (1906), 64 Atl. 821, 79 Vt. 206; *Matthews v. Minnesota Tribune Co.*, 10 N.W.2d 230 and *Gaspar v. United Milk Producers of California* (1944), 62 Cal. App.2d 546, 144 P.2d. The basic reasoning under *Lovell* and *Friedman* is, where a contract exists between two parties and performance on the part of one of the parties is refused or is placed by that party out of the power of performance, such action is a breach of the contract, is anticipatory in nature, therefore performance on the part of the other party is excused and that party may treat the contract as terminated and may sue for all damages present and anticipatory in the future resulting from such an anticipatory breach. *Friedman* points this out clearly (p. 328) and cites in footnote 10, 3 Williston, Contracts (Rev. Ed. 1936), Sec. 676; Restatement Contracts (1932), Secs. 294, 306. A reading of the cited sections in Williston and in Restatement supports our position that the evidence here establishes an anticipatory breach on the part of appellees, entitling appellant to damages.

We submit that this case presents the typical "Hornbook" anticipatory breach of contract entitling appellant to sue for the damages resulting. Thus, 12 Amer. Jur. Contracts, Section 391, defines anticipatory breach, which definition fits the facts in this case, as follows:

> General.- An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future.

In such circumstances, 12 Amer. Jur. Contracts, Section 392, states further:

> Majority Rule.- A majority of the Courts have reached the conclusion that a renunciation of a contract before the time of performance, which amounts to a refusal to perform at any time, gives the adverse

> party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach.

Amer. Jur., Contracts, agrees with our construction and this Court's construction of Williston. Thus, Section 391, footnote 17, states the rule of Williston to be:

> The view has been taken that where performance is not due at any fixed time, but only upon the demand or tender of the plaintiff, and the contract is repudiated by the defendant before any demand or tender by the plaintiff, such action of the defendant not only excuses the plaintiff from making any tender and authorizes him to rescind, if he chooses, but also amounts to a breach of the contract apart from the doctrine of anticipatory breach. 3 Williston, Contracts, p. 2370, Sec. 1319, citing and quoting Holmes, J., in Lowe v. Harwood, 139 Mass. 133, 29 N.E. 538. See also on this point Daniels v. Newton, 114 Mass. 530, at pp. 535, 536, 19 Am. Rep. 384.

17 C.J.S., Contracts, Sec. 473, supports our contentions that an anticipatory breach occurred here and appellant is entitled to recover his damages, and states (p. 973):

> Strictly an "anticipatory Breach" of a contract is one committed before the time has come when there is a present duty of performance, and it is the outcome of words or acts evincing an intention to refuse performance in the future. Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has, according to the great weight of authority, an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach.

The rule is the same whether the contract is wholly executory or has been partially executed.

Where a party terminates a contract without justification by words or acts, such termination is a breach of the contract and the other party is entitled to recover all damages resulting from the wrongful act. *G.L. Christianson and Associates v. United States* (USC of Cl. 1963), 312 F.2d 418, 423. In *Christianson*, the Court of Claims held (p. 423):

> The principal legal question is whether the claimants should be permitted to recover for anticipated profits. In this connection, it is settled that, when the Government enters into a contract, it has rights and it ordinarily incurs responsibilities similar to those of a private person who is a party to a contract. (Lynch v. United States, 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); Perry v. United States, 294 U.S. 330, 352, 55 S.Ct. 432, 79 L.Ed. 912 (1935), and if the Government terminates a contract without justification, such termination is a breach of the contract and the Government becomes liable for all the damages resulting from the wrongful act (United States v. Behan, 110 U.S. 338, 346, 4 S.Ct. 81, 28 L. Ed. 168 (1884); United States v. Spearin, 248 U.S. 132, 138, 39 S.Ct. 59, 63 L.Ed. 166 (1918).

Here appellees by executing the firm and binding lease with Grand Union have put it beyond their power to perform appellant's lease. Appellees obligated themselves to build, and could have built, a new shopping facility for Grand Union by December of 1965. These actions have destroyed the exclusive provisions of appellant's lease and he is entitled to recover in these circumstances the damages he has suffered.

(B) Luxenberg Is Entitled To Recover Eighty One Thousand Dollars in Damages From Mayfair, Gospel and Michaux

Under the authorities cited earlier in this Brief, the appellant's lease has been breached. His damages consist of the payments he made in good faith to Mayfair for good will in the sum of $15,000, the payment he made to Mayfair for fixtures in the sum of $1,000, the additional payment he made to Moder for additional good will in the sum of $5,000 and damages at the rate of $10,000 per year for the balance of his lease, namely, six years, or the sum of $60,000. The payment of these sums and the loss of these earnings were not disputed in the evidence. Luxenberg's evidence concerning these damages, we submit, is clear and convincing, and certainly he would earn a minimum of $10,000 per year in a newly constructed facility using the same amount of space of 2500 square feet, when 500 new apartment units are being built in the trade area. There is no evidence disputing any of the items of damages incurred.

Under the rule of damages laid down in breach of contract cases by the Supreme Court in *United States v. Behan*, 110 U.S. 338, 4 S.Ct. Rep. 81, it is stated (p. 83):

> The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, — First, what he has already expended towards performance, (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson v. Mayor

> of Brooklyn, 7 Hill, 69, they are "the direct and immediate fruits of the contract." they are free from this objection; they are then "part and parcel of the contract itself, entered into and constituting a portion of its very elements; something stipulated for. the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation."

Behan was cited later with approval by the Supreme Court in *Lovell, supra.*

Under *Behan* and *Lovell,* appellant is entitled to recover as damages. "FIRST. what he has already expended towards performance," that is, the sum of $15,000 paid for good will, $5,000 paid for good will and $1,000 paid for fixtures, which Luxenberg expended towards performance. Appellant is entitled to recover as damages, "SECONDLY, the profits that he would have realized by performing the whole contract." that is, his loss of future earnings computed at the rate of $10,000 per year, representing the balance of the term of "the whole contract," the sum of $60,000. We submit appellant is entitled to recover in damages Eighty One Thousand Dollars ($81,000.00), and a judgment in this sum should have been entered in appellant's favor against appellees. *Behan* is the basis for and was approved by the Supreme Court in *Lovell v. St. Louis Mut. L. Ins. Co.* (1884), 111 U.S. 264, 4 S.Ct. Rep. 890. *Lovell* was the basis for and was approved in *Roehm v. Horst,* 178 U.S. 1, 13, 20 S.Ct. 780, 785. *Roehm* was approved and adopted as the law of the District of Columbia in *Friedman v. Decatur Corp.* (CCA DC 1943), 77 U.S. App. D.C. 326, 135 F.2d 812. *Friedman* was followed by the court below in *Burke v. Thomas J. Fisher and Company, Inc.* (DC DC 1955), 127 F. Supp. 1, 2.

Under the law of the District of Columbia, appellant is entitled to recover his costs. His costs have been proven (and are undisputed) to be $15,000 paid initially for good will, an additional $5,000 as the cost of good will created in the exclusive grocery business and $1,000

for fixtures. These items were not disputed and are admitted as having been incurred by Luxenberg. Another item of costs which, unfortunately, was not proven in the evidence because it had not yet occurred, is the loss to Luxenberg on his vacating of the premises involving the forced sale of his fixtures and inventory.

In addition to costs, Luxenberg is entitled to recover his loss of future profits. In addition to the authorities cited earlier in support of these items of damage, the following authorities support our contentions in this regard:

In *Fontainbleu Hotel Corp. v. Crossman,*(CCA 5, 1963), 323 F.2d 937, the Court held where one party breaches an exclusive lease, the other party is entitled to recover all "dimimutions of rental value" or "loss of profits" and where the party chooses to continue under a breached lease, is further entitled to an injunction enjoining the future violation of the exclusive provisions of a lease. In *Fontainbleu,* as here, one exclusive lease was breached by the giving of another lease and this was held to give rise to a cause of action for all damages suffered and, as the party also elected to continue to operate under the lease, was entitled as well to injunctive relief.

In *Interstate Life and Accident Ins. Co. v. RKA Telleradio Pictures* (CCA 6, 1963), 318 F.2d 73, the Court of Appeals upheld the right of one party to a lease which was partially breached to recover damages measured by the annual cash rentals involved in the lease and was also entitlted to recover reasonable counsel fees and expenses as well.

In *Homelite v. Trywilk Realty Co.* (CCA 4, 1959), 272 F.2d 688, where fraud and misrepresentation were involved in the entering of a lease agreement, the Court of Appeals upheld the right of one party to the agreement to recover damages incurred in preparing the leased premises for its intended uses. In *Homelite.* the Court of Appeals held (pp. 693-694):

> We are of the opinion that the essential elements of fraud and misrepresentation as defined in Cofield v. Griffin, supra, are present here; that the false representation was material and that Homelite would not have entered into the lease agreement if it had known the true facts; that it was justified in rescinding the lease and is entitled to recover proper damages incurred by it in preparing the leased premises for its intended uses. The case must be reversed and the cause remanded for further proceedings consistent with the views here expressed.

In *Dyal v. Wimbish* (CCA 5, 1941), 124 F.2d 464, a landlord was sued for wrongfully cancelling a lease of a warehouse for all the damages flowing from such cancellation. The Court held that evidence showing the profit from the lease in previous years was properly received in evidence and from this evidence affirmed a judgment awarding damages, including the loss of future profits for the remainder of the term of the lease, and in doing so held (p. 467):

> In this case the damages flow directly from the breach of the contract. Considering the previous relations of the parties it would be unreasonable to say that Dyal did not contemplate that Wimbish would realize profits from the leasing of the warehouse. In no sense could it be said that Wimbish's claim for damages is based on conditions incidental to but unconnected with the breach of the contract of lease. In the following cases it was held that damages based on loss of future profits need not be proved with absolute certainty and that the previous course of business between the parties and the profits derived therefrom may be looked to as a fair basis for determining what profits would have been earned had the contract not been breached. Pennsylvania Steel Co. v. New York City Ry. Co., 2 Cir., 198 F. 721; Eastman Kodak Co. v. Southern Photo Material Co., 5 Cir., 295 F. 98; Rynveld v. Dupuis, 5 Cir., 39 F.2d 399; Columbia Gas Co. v. Tibma, 7 Cir., 63 F.2d 538. The

> law of Georgia is in conformity with these rules. Levy, Brother & Co., Inc. v. Allen, 53 Ga. App. 246, 185 S.E. 369, and authorities cited therein.
>
> There is no doubt the evidence tending to show the profits made by Wimbish from the leasing of the Planters Warehouse in previous years was properly admitted. The District Court left it to the jury to find the facts under a charge that clearly and correctly stated the law.

The other side of the coin, that is, when a tenant breaches a lease, the landlord, where there is an anticipatory breach of the lease by the tenant, is entitled to recover profits calculated from the market value of the shopping center. *Maida v. Kroger Company* (MSDC ED Tex. 1964) 230 F.Supp. 668. In *Maida* the Court held (pp. 673-674):

> I conclude as a matter of law that plaintiff made a good faith offer to defendant, after the breach and repudiation, to complete the building and to perform the contract provided defendant would approve the plans and specifications and agree to a reasonable extension of time for construction, and such effort to effect performance was rejected by defendant, and the contract was forever breached and repudiated by the defendant on or about July 22, 1960.
>
> * * *
>
> I conclude as a matter of law that the proper measure of damages would be the profits the plaintiff stood to make from the lease, discounted to its present value.
>
> * * *
>
> The burden was on the defendant to offer evidence of plaintiff's failure to mitigate damages, and since no evidence was offered by defendant as to mitigation, plaintiff discharged his duty to defendant.

In the case at bar, the appellees did not submit any evidence concerning any so-called "failure of Luxenberg to mitigate damages" — hence that issue is not involved in this action under *Maida*. Luxenberg's

costs, including the costs he paid for good will, are recoverable. Good will is a business asset and is one of the most valuable parts of a business, particularly a business operating under a lease. *Meeker v. Stuart*, (USDC 1960), 188 F.Supp. 272, affirmed, *Stuart v. Meeker* (CCA DC 1961), 110 U.S.App. D.C. 161, 289 F.2d 902.

Meeker holds (p. 275):

> Assets of a business are not limited to its tangible property or its lease, but necessarily include good will. In fact, very frequently good will is the most important asset of a business, and this is especially true of a business that furnishes service instead of selling merchandise. What is good will? Good will may be defined as the habit of customers to return to the concern with which they have been previously dealing. The more ingrained the habit, the greater the number of such customers, the more valuable is the good will.

A similar conclusion was reached by this Court in defining good will in *Burke v. Canfield* (CCA DC 1941), 74 App. D.C. 6, 121 F.2d 877. In *Burke* this Court of Appeals held (p. 881):

> It is not necessary to consider exhaustively what constitutes good will. It is of course characteristic of a going business and essentially is constituted in the tendency of customers to return for trade to those with whom they are accustomed to deal. Many and varied elements may hold out the lure to return. They include an established trade name, a specific or general location, a reputation for service, personal attention, reasonable prices, etc. For most purposes good will must be dealt with legally in connection with the business of which it has been said to be parasitic.

Good will is a valuable business asset and in the acquisition of a business is a recognized business cost.

District of Columbia v. ACP Industries, Incorporated, (CCA DC 1965), 350 F.2d 795, 799;

Falstaff Beer, Inc. v. C.I.R. (CCA 5, 1963), 322 F.2d 744;
Karan v. C.I.R. (CCA 7, 1963), 319 F.2d 903.

Good will payments are considered for tax purposes as capital expenditures and *Falstaff* and *Karan* so hold. As capital investments in business, they are business costs and their loss through a wrongful breach of a lease agreement are recoverable items of damages.

We again submit appellant is entitled to recover in damages $15,000 paid for good will; $5,000 paid for good will; $1.000 paid for fixtures and the profits that he would have realized for the balance of the term of his lease, computed at the rate of $10,000 per year, representing the balance of the term of "the whole contract," that is, the sum of $60,000, or the total sum of $81,000, and the court below should have so ordered.

V. CONCLUSION

We submit that the court below should be reversed with instructions to enter a judgment in favor of the appellant against appellees in the sum of $81,000.00.

Respectfully submitted,

WARREN E. MAGEE
THOMAS G. LAUGHLIN
HANS A. NATHAN

1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for Appellant

Of Counsel

Magee & Bulow
1730 K Street, N.W.
Washington, D.C. 20006

BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,204

DAVID LUXENBERG, *Appellant*,

v.

MAYFAIR EXTENSION, INC., a corporation,
GOSPEL SPREADING ASSOCIATION, INC., a corporation,
L. S. MICHAUX, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

JOEL C. WISE
1707 H Street, N. W.
Washington, D. C.
Attorney for Appellees

Of Counsel:

ROGER PEED
1707 H Street, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

STATEMENT OF QUESTION PRESENTED

The question presented by this appeal is:

Whether the court below erred in dismissing the Cross Complaint of appellant, David Luxenberg.

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BRIEF FOR APPELLEES

I. STATEMENT OF THE CASE

On November 9, 1951, Mayfair Extension, Incorporated,[1] entered into an agreement with David Luxenberg and Barney Moder,[2] for the lease of certain premises, known

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[1] Hereinafter referred to as Mayfair.

[2] Hereinafter referred to as Luxenberg.

and identified as 3926 Hayes Street, N. E., Washington, D. C. The 1951 lease reads in pertinent part as follows:

> "The lessees under this lease shall have the exclusive right to conduct a food store in the present existing premises for the duration of their Lease, should said premises remain in existence, or until the present building in which said grocery store is located is demolished for reconstruction or replacement purposes. Upon the demolition of the present premises and upon completion of replacement facilities, said lessees shall have the first option to lease the food market and grocery facilities in said replacement facilities for a term at least equal to the unexpired term of this Lease, and for a percentage rental of ½% of gross sales, payable monthly."

This lease was modified by an agreement, dated August 9, 1961, extending and amending the terms of the original lease. This agreement reads in pertinent part as follows:

> "1. The aforesaid Lease of November 9, 1951, shall remain in full force and effect under all of its terms and conditions, except as herein otherwise provided, in favor of the herein-named lessee.
>
> "2. The term of the aforesaid Lease is hereby extended for a period of five years from November 15, 1961, with an option in favor of the lessee for one renewal of said lease for a period of five (5) years from November 15, 1966, under the same terms and conditions of said Lease as hereby amended provided that the lessee shall notify the lessor on or before September 15, 1966, in writing of election to exercise this option.
>
> • • •
>
> "6. The terms and conditions of the aforesaid lease granting to the lessees therein named the first option to lease the said food and grocery facilities which might replace the existing premises after the possible demolition thereof shall remain in full force and effect in favor of the lessee except only that the rate of rental to be paid in such case shall be an amount equal to any bona fide offer which the lessor may receive

> from another prospective tenant under like conditions as those in favor of the lessee, and in such case the lessee shall have thirty days from the date of the receipt by him of notice of the terms and conditions of said bona fide offer within which to elect to exercise said option to lease the said replaced facilities."

By letter dated April 19, 1963, the lessee exercised his option to extend the lease for an additional five years from November 15, 1966.

The basic lease, the amendment, and the extension letter were recorded with the Recorder of Deeds on September 24, 1964.

Mayfair Extension, Incorporated, is a Maryland corporation, authorized to do business in the District of Columbia, and is the fee owner of the land and the improvements which are the subject of this litigation. Sixty (60) per cent of the corporate stock is owned by Gospel Spreading Association, Inc., and forty (40) per cent is owned by L. S. Michaux. L. S. Michaux is the president of Mayfair Extension, Incorporated, and is also president of Gospel Spreading Association, Inc.

Gospel Spreading Association, a non-profit religious organization, is a District of Columbia corporation.

On May 14, 1964, Gospel Spreading Association,[3] entered into a lease agreement with The Grand Union Company,[4] a Delaware corporation, to lease space in a shopping center to be constructed on the northwest side of Kenilworth Avenue, between Hayes and Jay Streets, Northeast, Washington, D. C. This is the same property that is the subject of the Luxenberg-Mayfair lease.

On August 5, 1964, Mayfair, through its agent, Walker and Dunlop, wrote Luxenberg a letter requesting him to vacate the premises on or before October 1, 1964.

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[3] Hereinafter referred to as Gospel.

[4] Hereinafter referred to as Grand Union.

On September 19, 1964, Mayfair, through its agent, Walker and Dunlop, sent a letter to Luxenberg withdrawing the notice to vacate, dated August 5, 1964, and reaffirmed the aforesaid lease agreement. The letter reads as follows:

> "Reference is made to a letter addressed to you August 16, 1964, in which you were requested to vacate the premises which you are occupying and known as 3926 Hayes Street, Northeast, on or before October 1, 1964. Kindly take this letter as notice to you that our principal does not at this time intend to demolish the existing premises. Therefore the request set forth in the referred to letter of August 5, 1964, is cancelled and of no effect.
>
> "We wish also to affirm to you on behalf of our principal, Mayfair Extension, Inc., the lessor referred to, to premises which you are operating as a grocery store, that such a Lessor reaffirms to you the lease dated November 9, 1951 made between Mayfair Extension, Inc., lessor and David Luxenberg and Barney Moder, D. C. as amended, and that your lessor under such a lease intends to follow the terms required by it to be performed under such lease as amended."

On September 13, 1962, Mayfair was ordered by the Department of Licenses and Inspections, D. C., to raze the buildings in question and to clear the lots involved. That order was appealed. On March 21, 1963, a hearing was held by the Board of Appeals and Review, at which evidence and testimony were taken. On March 28, 1963, the Board of Appeals and Review sustained the order of the Department of Licenses and Inspections.

On December 18, 1964, the Board of Commissioners, D. C., filed an injunction against Mayfair to enforce the order of the Department of Licenses and Inspections. Mayfair Extension, Incorporated, joined David Luxenberg, the lessee, as a party defendant.

On October 27, 1965, after hearings, the Court below entered an order granting the injunction and directing

that the structure be razed and the lots cleared on or before February 1, 1966.

The structures were razed and the lots cleared prior to February 1, 1966. Mayfair has not elected to rebuild the structure.

Luxenberg appealed the decision of the Court below and on or about July 25, 1966 filed his Brief and Joint Appendix.[5]

II. SUMMARY OF ARGUMENT

A. Appellees contend that its lease agreements, as modified, with Appellant does not grant to Appellant the right to demand a building be constructed following the demolition of the subject premises. Further, that the only remaining right flowing from the modified lease agreement, in favor of Appellant, is a first option to lease a replacement foods market if he can equal any bona fide offer of rental that Appellees may receive from another prospective tenant, and that Appellees are under no obligation to construct another grocery facility after demolition. In order to support an anticipatory breach, Appellant must establish a continuing contractual obligation on behalf of Appellees and that Appellees have refused to or are unable to perform under the agreement.

B. Appellant is not entitled to damages, as alleged. The maximum damages, if any, would be limited to the sum of $21,000.00, the sum Appellant was willing to sell the business as set forth in sales agreement (J.A. 79).

III. ARGUMENT

In order to sustain the position taken by Luxenberg that Mayfair breached the agreement, it must be established that the agreement between the parties placed a contractual burden upon Mayfair to rebuild the grocery

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[5] Hereinafter referred to as J.A.

facility and to require Mayfair to seek and offer from some third party and submit it to Luxenberg for approval or rejection.

This entire lawsuit is founded on the interpretation of paragraph 6 of the lease amendment dated August 9, 1961 (J.A. 57). Paragraph 6 gives to Luxenberg the first option to lease said food and grocery facility which *might* replace the existing premises after the possible demolition thereof . . . It is impossible to construe this provision as placing any duty or obligation on Mayfair to rebuild the facility. Mayfair has razed the building and cleared the lots as required by the Court below but has not elected to rebuild a grocery facility. Mayfair could elect to let the lots remain vacant, could elect to build a gas station, office building, hotel or a number of structures without doing any violence to Luxenberg's first option. The Court below correctly decided this issue when it held that Luxenberg still has the power to perform his contract.

The lease between Gospel and Grand Union (J.A. 62) was executed on May 14, 1964. On September 10, 1964 Mayfair advised Luxenberg in writing (J.A. 16, 22) that Mayfair intended to honor the terms of its lease with Luxenberg. By this notice, Appellee elected to honor its obligations under the lease with Luxenberg and to default under the agreement between Gospel and Grand Union (J.A. 62). Therefore, it cannot be found that the mere existence of the Grand Union lease prevented or estopped Mayfair from performance under its agreement with Luxenberg.

The Court below also found that title to the subject land vests in Mayfair. No evidence was produced at the trial below to show title in anyone other than Mayfair. Under the laws of the District of Columbia, Gospel Spreading Association cannot legally convey, lease or encumber the fee in question. (Title 45, Chapter 3, Section 302, D. C. Code, 1961 Edition).

Gospel has not performed or taken any action to honor or comply with the terms and conditions of the Grand Union lease. The Grand Union lease required Gospel to have a supermarket completed and ready for occupancy on or before the first day of December, 1965. The lot has been cleared and is now vacant land. Appellant failed to produce any evidence below that the Grand Union lease is binding on Mayfair Extension, Incorporated, the fee owner of the real estate or that Gospel has made any attempts to comply with the terms and conditions thereof. The only evidence produced by Appellant below is that Gospel is in default under its lease with Grand Union.

Luxenberg relies on the testimony of Wallace B. Agnew to support his position that the Grand Union lease made it impossible for Mayfair to perform under its amended lease with him. Agnew testified (J.A. 46-47) that after he became aware of the fact that the Luxenberg lease had been extended he, as agent for Mayfair, notified Luxenberg in writing telling him he did not have to vacate. Agnew further testified that, as agent for Appellees, he advised Mr. Longchampe, agent for Grand Union, that they can't get the store and that they can't grant an extension.

It is clear from the testimony in the trial below that Appellees intended to breach the agreement with Grand Union and honor its agreement with Luxenberg.

Luxenberg's entire case is based upon a theory that Mayfair was contractually bound to replace the grocery facility after demolition. It is well established that questions of the interpretation of a contract are questions of law to be decided by the court. The Court below correctly interpreted the contract as follows:

A. "The Luxenberg's lease, as modified, does not grant Luxenberg the right to demand that a building be constructed following the demolition of the present premises". (J.A. 24).

B. "If a building is constructed, the terms of the lease do not afford Luxenberg an exclusive right to conduct a food store on the new premises". (J.A. 24).

C. "Mayfair, Inc., has not reached a point in which they are obligated to perform at all; their obligation rests upon contingencies not yet realized". (J.A. 24).

Luxenberg relies primarily on the case of *Friedman* v. *Decatur Corporation* (C.C.A. 1943), 77 U.S. App. D.C. 326, 135 F. 2nd. 812. The Court below correctly distinguished this case and held that the question was not in issue (J.A. 24). In order to apply the legal principle established by *Friedman* v. *Decatur*, it must be shown by the evidence that Mayfair was contractually obligated to Luxenberg to rebuild a new facility or produce evidence that Mayfair advised Luxenberg that it did not intend to honor Luxenberg's option. In the case at bar Mayfair advised and notified Luxenberg that it intended to honor the agreement (J.A. 16, 22). The other cases cited by Luxenberg which followed the law laid down in *Friedman* v. *Decatur*, there was a continuing obligation on the part of the defendant to perform a contractual obligation and in each case the defendant committed some overt act which made performance impossible. As held by the Court below, the evidence in this case does not support that position.

The decision of the Court below should be sustained. The Court below held that Mayfair on September 9, 1964 reaffirmed its lease agreement with Luxenberg. (J.A. 22, 23, and 25).

It is to be noted that the reaffirmation was on September 19, 1964 and that the lease between Gospel and Grand Union was dated May 14, 1964. It is to be further noted that Luxenberg enjoyed the use of the premises under the lease provision until ordered by the Court below to vacate by November 25, 1965.

The Court below ordered the buildings razed and the lots cleared on or before February 1, 1966. (J.A. 23).

Pursuant to the order the buildings were razed and the lots cleared in January, 1966, and remain as vacant lots. It is to be noted that Luxenberg, a party defendant did not offer any evidence in the trial below opposing the injunction proceedings.

The Court below found that Mayfair does not assume the obligation to receive Luxenberg's bid until after completion of a new building (J.A. 24). Said finding is correct since the agreement between the parties did not require Mayfair to rebuild the facility after possible demolition.

The Court below found that the repudiation of the lease was retracted. The Court below correctly found that Mayfair, by letter dated September 10, 1964, reaffirmed its agreement with Luxenberg and that both parties continued to perform under the reaffirmed contract (J.A. 25). To support this finding, the Court cited the following:

> "The power of retraction of a repudiation does not cease to exist until the promisee has materially changed his position in reliance upon the repudiation. 4 Corbin, Contracts #950, pg. 931. The valid retraction not only restores the duty of the other party, thus making the contract enforceable, it also reinstates conditions precedent to the duty of the repudiator, so that performance of such conditions are now once again necessary before Mayfair can be charged with a breach. 4 Corbin, Contracts, 980, pg. 933."

The Court below found that Luxenberg still has the power to perform his contract (J.A. 25). This finding is correct and is in compliance with the agreement between the parties. Once the building was razed as ordered by the court and as contemplated in the lease, as amended, all that remained in favor of Luxenberg was a bare legal option. The option was contingent on Mayfair rebuilding a grocery facility and further contingent upon Luxenberg

being in a position, within 30 days, to meet any bona fide offer that Mayfair might obtain from another proposed tenant.

To support the position taken by Luxenberg, that the lease between Grand Union and Gospel dated May 14, 1964 (J.A. 62) was a breach of the first option between Mayfair and Luxenberg (J.A. 57) it must be established that Mayfair, under its lease with Luxenberg, had a continuing obligation to rebuild a grocery facility after possible demolition. The Court below correctly held that Mayfair did not have a continuing obligation to perform on its part and cannot be liable for a breach of contract.

The Court below correctly distinguished the cases cited by Luxenberg from the case at bar. In all the cases cited by Luxenberg in the Court below and all the cases cited in Appellant's brief on appeal, there was a continuing obligation on the defendant to perform a contractual duty and when the defendants refused to perform, or were unable to perform, the courts held that they breached the contract.

The Court below correctly distinguished the cases of *White* v. *Lumiere* (1906), 64 Atl. 821, 79 VT 206; *Matthews* v. *Minnesota Tribune Co.*, 10 N.W. 2nd 230; *Gasper* v. *United Milk Producers of California* (1944), 62 Cal. App. 2nd 546; and *Miller* v. *Schwinn*, 72 App. D.C. 282, 284, 113 F. 2nd 748, 780, and *Lovell* v. *St. Louis Mutual Ins. Co.*, 11 U.S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390, cited by Appellant in his brief and also cited by Appellant in the Court below. The Court below found that in each of the foregoing cases cited by Appellant defendant was powerless to perform his contractual obligation. Appellees, as found by the Court below, have not placed it beyond their power to perform.

Appellant by reference to Treatises, set forth in the index and on pages 30 and 31 of his brief, has correctly

defined an anticipatory breach of a contract; however, he has failed to produce any evidence that an anticipatory breach, as defined, was committed by Appellees in the subject case. Mayfair has never refused to perform; on the contrary, it notified Appellant (J.A. 16, 22) that it intended to honor the amended lease agreement.

Luxenberg cites the case of *Schwartz* v. *Westbrook* (C.C.A. D.C. 1946), 81 U.S. App. D.C. 64, 154 F. 2nd 854, in support of his position. The same factual situation pertains; Luxenberg must show that Mayfair was bound by its lease to rebuild the facility. Also Luxenberg elects to ignore the written reaffirmation of the lease by Mayfair (J.A. 16, 22). This case would be applicable if the Appellant was Grand Union rather than Luxenberg.

Luxenberg contends in his brief (page 25) as follows: "Our contention is that the binding lease by Appellees with Grand Union constituted an action which put it beyond the power of these parties to perform their obligations to Appellant under his lease." To support this contention Appellant must show that Appellees had a contractual duty to replace the facility after demolition. Since the facility has been razed, pursuant to the court order below, the only right Appellant has under his agreement is a first option to lease a grocery facility which might replace the former facility. Appellant was further advised that Mayfair intended to honor its agreement (J.A. 16, 22) which cannot be construed as refusal or denial of Appellant's contractual rights. When Gospel entered into the lease with Grand Union (J.A. 62) that agreement was impossible to perform because of the outstanding agreement with Appellant and as such did not affect the right of Appellant under his agreement.

The agreement between Mayfair and Luxenberg is similar to an option to purchase under a lease in the event the lessor should elect to sell the property. It is well settled that the option does not become executory until

the lessor decides to sell. All that Luxenberg has is an option contingent on the completion of a replacement grocery facility.

After the lease agreement between Gospel and Grand Union had been executed, Mayfair reaffirmed its agreement with Luxenberg in writing (J.A. 16, 25). In *Fischnaller* v. *Summers* (1959), 53 Wash. 2nd 332, 333 P. 2nd 636, the Court held that:

> "The rule is well established that when a party has repudiated a contract, even after an actual breach, if that breach is not material, the repudiation being before the time for full performance has arrived, this repudiation can be withdrawn unless the other party, before the withdrawal, has manifested an election to rescind the contract or materially changed his position in reliance on the repudiation."

In *Swinger* v. *Hagman*, 56 W. Va. 123, 48 SR 839; 1 Restatement of Contracts, 481, Sec. 319; 12 American Jus. 976, Sec. 398; 5 Williston on Contracts 3750, Sec. 398:

> "Since the optionor did not repudiate his contract with the plaintiff, but on the contrary expressed his willingness to go forward with it, the loss, if any, which the plaintiff sustained was due to their own unwillingness to assume the burden of the contract."

It is to be noted that after the reaffirmation of the Luxenberg lease (J.A. 16, 25) he continued under his lease agreement until ordered by the Court below to vacate.

In *Plunkett* v. *Comstock, Cheney Co.*, 211 App. Div. 737, 208 NYS 93, the Court held that:

> "The words or acts of refusal must constitute a definite renunciation of the contract or its principal terms."

In the subject case there was no definite renunciation of the lease contract, but on the contrary the lease contract was reaffirmed.

In *Slaughter* v. *Barnett* (1934), 114 Fla. 352, 154 So. 134, 102 ALR 1073, the Court held that:

> "A mere statement by a vendor, made before the date fixed in the contract for him to perform, that he does not intend to carry out the arrangements, does not give to the vendee an immediate cause of action for damages . . . unless the anticipatory breach is accompanied by some fact which shows a direct, unequivocal, and absolute purpose to breach the contract amounting in substance to an actual breach."

In the Luxenberg lease contract there could not be an actual breach until a replacement grocery facility was completed. His option cannot become executory until such time as a replacement facility is completed. Further, under the lease in issue, (J.A. 49-56) Mayfair can elect not to rebuild the grocery facility. In *Mobley* v. *New York Life Ins. Co.*, 295 U.S. 632, 55 S. Ct. 876, 90 ALR 1166, the Court held that:

> "Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon a total breach, must at least amount to an unqualified refusal, or declaration of inability, substantial to perform according to the terms of his obligation."

In *New York Life Ins. Co.* v. *Viglus*, 297 U.S. 632, 55 S. Ct. 876, the Court followed the law laid down in Mobley.

This case does not present an anticipatory breach or an actual breach. After demolition as ordered by the Court below, Luxenberg's only remaining right was a first option to lease a replacement facility which might be constructed. This option remains in full force and effect and is still binding on Mayfair.

17 Am. Jur. 2nd 450:

> "In order to justify the adverse party in treating the renunciation as a total breach, the refusal to perform must be of the whole contract or of a promise or obligation going to the whole consideration, and it must be distinct, unequivocal, and absolute."

17 Am. Jur. 2nd 451:

> "It is a well-established general rule that where a party repudiates a contract before time for performance arrives, the repudiation may be withdrawn unless the other party, before the withdrawal, manifests to rescind the contract or materially changes his position in reliance on the repudiation."

The evidence relied on by Luxenberg does not support an anticipatory breach or an actual breach of the lease agreement with Mayfair.

IV. DAMAGES

Luxenberg claims in his brief that this Court should direct the Court below to award him $81,000.00 in damages based on an alleged breach of the lease, as amended, between him and Mayfair.

Before the question of damages can be considered, this Court must find that the Court below was in error and reverse the decision of the Court below and remand the case for further proceedings.

Luxenberg claims the following as damages: $15,000.00 originally paid by him and his former partner, Barney Moder, plus $1,000.00 paid for fixtures, $5,000.00 paid to buy out Moder, plus $10,000.00 per year for the unexpired term of the lease as amended.

The fixtures were purchased by Luxenberg in August, 1961, for the sum of $1,000.00. Luxenberg has had continuous use of the fixtures from August, 1961, through November, 1965. Under normal depreciation the fixtures have no value today.

The $5,000.00 paid by Luxenberg to buy out his partner, Barney Moder, cannot be a measure of damage against Mayfair. By buying out his partner, Luxenberg became the sole owner and retained all the profit and did not have to split with Moder.

The loss of income, to wit, $10,000.00 a year, is not a valid claim against Mayfair. Under the lease, as amended, Luxenberg would not be entitled to any income from the date the buildings were razed and the date a new building was erected. In any event Luxenberg would only be entitled to the loss of income from the date of his removal until such time as he exercised his option and opened a new store.

Luxenberg has, since the date of the lawsuit, opened a new food store and the income being received is an off-set against any possible claim against Mayfair.

The maximum damage, if any, was established by Luxenberg in the trial below. Luxenberg testified that he was willing to sell his business for the sum of $21,000.00 and had a firm agreement to sell (J.A. 79). The true value of a business is the sum that a willing buyer will pay to a willing seller. The agreement of sale between Luxenberg and Leon Beck and Ethel Beck (J.A. 79) established the maximum damage, if any, suffered by Luxenberg. This court cannot find that Luxenberg has been damaged in excess of the sum he was willing to sell the business for in December, 1961.

V. CONCLUSION

The Court below was not in error in dismissing Appellant's claim and the decision must be sustained.

Respectfully submitted,

JOEL C. WISE
1707 H Street, N. W.
Washington, D. C.
Attorney for Appellees

Of Counsel:

ROGER PEED
1707 H Street, N. W.
Washington, D. C.